United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

United States Court of Appeals
for the District of Columbia Circuit

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1169

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM THOMPSON,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

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STATEMENT OF THE ISSUES

I. WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR ACQUITTAL WHERE THERE WAS INSUFFICIENT EVIDENCE TO SHOW THAT DEFENDANT, TRIED ONLY AS AN AIDER AND ABETTOR, PARTICIPATED IN, SANCTIONED OR PROMOTED THE OFFENSES CHARGED.

II. WHETHER, IN A CASE WHERE THE EVIDENCE AGAINST DEFENDANT, CHARGED ONLY WITH AIDING AND ABETTING, WAS WEAK, AND THAT AGAINST HIS CO-DEFENDANT, CHARGED AS THE ACTIVE PERPETRATOR, WAS STRONG, THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR SEVERANCE.

III. WHETHER, IN A CASE WHERE THE STRONGER EVIDENCE AGAINST THE PRINCIPAL INEVITABLY RUBBED OFF ON DEFENDANT, ALLEGED TO BE AN AIDER AND ABETTOR, THE COURT ERRED IN FAILING ADEQUATELY AND CLEARLY TO INSTRUCT THE JURY THAT EVIDENCE AGAINST DEFENDANT AND THE ISSUE OF HIS GUILT AS AN AIDER AND ABETTOR SHOULD BE CONSIDERED SEPARATELY FROM THE CASE AGAINST THE PRINCIPAL.

IV. WHETHER THE COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS TESTIMONY BY POLICE OFFICERS ABOUT DEFENDANT'S RESPONSES TO POLICE QUESTIONING ELICITED DURING CUSTODIAL INTERROGATION WITHOUT THE WARNINGS REQUIRED BY MIRANDA v. ARIZONA.

REFERENCES TO RULINGS

Appellant Thompson was indicted and tried jointly with Clarence Watts. On November 16, 1970, the first day of trial, the District Court denied Thompson's motion to sever Thompson from the trial of Watts (Tr. 9).

On November 17, 1970, at the close of the Government's case (Tr. 161) and at the end of the trial (Tr. 238), the court denied Thompson's motion for acquittal based on the insufficiency of the evidence. On the same day, at the conclusion of the Government's case, the court denied Thompson's motion to suppress any testimony relating to his interrogation by the police (Tr. 241).

On November 17, 1970, the jury found Thompson guilty of first degree burglary while armed, robbery while armed, and assault with a dangerous weapon (Tr. 270-271). The trial court sentenced Thompson to two to eight years on February 19, 1971, the sentences to run concurrently (Judgment and Commitment Form, dated February 19, 1971).

STATEMENT OF THE CASE

This is an appeal from a judgment of conviction by a jury, after a two day trial on November 16 and 17, 1970 before District Judge June Green and a jury, finding defendant Thompson guilty of burglary in the first degree while armed (D.C.Code §22-3202 (1967 Ed.)), armed robbery (D.C.Code §22-3202 (1967 Ed.)), and assault with a dangerous weapon (D.C.Code §22-502 (1967 Ed.)).

Although Thompson and one Clarence Watts were indicted jointly for the above offenses, the Government's case against Thompson rested entirely upon the theory that he was an aider and abettor and that Watts was the principal in the burglary, robbery and assault of William Ledbetter on the evening of December 23, 1969 (Tr. 8; Transcript of Proceedings, Opening Statements and Final Arguments 10 (hereinafter cited "Supp. Tr.")). 1/

The case against Thompson was entirely circumstantial, as the Government conceded (Tr. 9). It rested primarily on inferences drawn from evidence of his presence at the scene of the crime, from his prior association with the complaining witness and with the co-defendant, and from the way in which he "participated" in the police investigation after the crime occurred (Tr. 7).

1/ Watts was also convicted, and an appeal from his conviction has been taken to this Court (No. 71-1284).

1. The Events of December 23, 1969.

On December 23, 1969, at about 11:00 p.m., the complaining witness, Ledbetter, testified he was awakened from his sleep by a knock on his bedroom window (Tr. 14, 54-55). He said that the knocking continued intermittently for about 25 minutes, during which time the knocker walked away from the window and then returned at certain intervals (Tr. 14, 54-56). Thompson himself testified, however, that he was at the window only a few minutes (Tr. 201, 214). Finally, Ledbetter said, he arose and pulled up the shades covering the window, when he saw the defendant (Tr. 54-56).

Thompson testified that he wanted to join Ledbetter for a drink and that Ledbetter immediately invited him into the apartment (Tr. 201-202). Ledbetter testified that at first he declined, saying that he had to arise early for work the next morning (Tr. 15). But they agreed that Thompson was admitted to the Ledbetter apartment to have a drink.

Ledbetter and Thompson were talking in the former's living room when a knock was heard at the front door (Tr. 202). It was Ledbetter's testimony that he did not hear a knock and that Thompson opened the door (Tr. 15, 62); but Thompson testified that both heard the knock

and that Ledbetter opened the door (Tr. 202). When the door was opened partially, two men kicked it in and burst into the room (Tr. 15, 131, 202).

The intruders, who carried a shotgun and handgun, ordered both Ledbetter and Thompson to lie on the floor (Tr. 15, 66). According to Ledbetter, Thompson lay on the floor face-up (Tr. 16, 67). The robbers forced Ledbetter to lie face down and then took him to the bathroom (Tr. 15, 16, 69). There they tied him up and ransacked his bedroom, eventually finding and taking $1,000 in cash and other articles of value (Tr. 15-17, 22-23).

Thompson testified that he remained in the living room where the two robbers were joined by two other males who stood guard over him (Tr. 203-204) and Ledbetter conceded he was not in a position to see either the living room or the third and fourth robbers (Tr. 71-72). After some discussion among the four men, Thompson testified, they decided to take him with them and escorted him to a get-away car driven by a fifth man (Tr. 203-205, 215-219). Thompson testified that he was taken by the robbers in the back seat of their automobile to the 200 block of Rhode Island Avenue, Northeast, where they pushed him out, and that he caught a bus back to the apartment (Tr. 206-207).

Ledbetter testified that after the robbers departed he untied himself, walked to a neighbor's house across the street, and called the police (Tr. 19). He and Thompson returned to Ledbetter's apartment at about the same time (Tr. 206-207).

2. Evidence Relating to Thompson's Prior Association with Watts, the Principal, and Ledbetter, the Complaining Witness.

Thompson lived in the same neighborhood as the co-defendant Watts, was friends with Watts, saw him frequently, and occasionally visited his house (Tr. 172-173, 226-228).

Thompson and Ledbetter were friends; for several months prior to the robbery, Thompson frequently stopped by Ledbetter's apartment in the evening where the two talked and drank (Tr. 11, 14, 94-94a, 96). Thompson testified that he usually came by after leaving work in Virginia at 10:30 p.m. (Tr. 200), but Ledbetter testified he never arrived at such a late hour (Tr. 94-94a). Ledbetter never told Thompson that he had a considerable sum of cash hidden in his apartment (Tr. 107-108).

According to Ledbetter, some time prior to the night of the robbery, Thompson brought Watts with him to visit Ledbetter's house (Tr. 84-85, 97-98);

Ledbetter never mentioned the visit to the police, however (Tr. 102, 107, 131-32), and Thompson denied it (Tr. 208-209). Ledbetter also failed to mention to the police his prior acquaintance with Watts until the police showed him a mugshot of Watts five days after the robbery (Tr. 112).

3. The Police Investigation

The Government's charge against Thompson was based largely upon his conduct subsequent to the alleged robbery, as related by three teams of police involved in the investigation -- the first on December 23, the night of the burglary and robbery; the second, five days later; the third on January 4, 1970.

a. December 23, 1969.

Officer Hawley responded to Ledbetter's call following the robbery and arrived at Ledbetter's apartment at approximately 12:20 a.m. (Tr. 147). When he arrived both Ledbetter and Thompson were in the apartment, the latter having arrived there just before Ledbetter had returned from calling the police at a neighbor's house (Tr. 20, 147, 206-207).

Officer Hawley obtained a description of the robbers from Ledbetter and Thompson and transcribed their responses on a PD 251 form (Gov't. Ex. 3). That form

shows he was told that there were four robbers -- Negro, male, age 19 or 20. The robber carrying the sawed-off shotgun was described on the PD 251 form as "five seven, 150 pounds, slim build, Afro bush, ... mustache and full beard." (Gov't. Ex. 3; Tr. 144). A second robber was described as armed with a .38 caliber revolver "five seven, 140 lbs., slim build, Afro bush, mustache ..." (Gov't. Ex. 3; Tr. 144). No further description of the third and fourth robbers was elicited or transcribed by Officer Hawley (Tr. 144).

At trial, Ledbetter identified Watts as the robber who carried the sawed-off shotgun (Tr. 15). Watts was heavier and taller (Morrison's Affidavit in Support of Arrest Warrant of Watts) than the robber with the shotgun described on the PD 251 completed by Officer Hawley (Gov't. Ex. 3). Ledbetter testified that he told Officer Hawley what height and weight the robber with the shotgun was (Tr. 76), although at trial he did not say what height and weight he had described to Officer Hawley. Thompson testified that he told Officer Hawley that the robbers were about 5'11", not 5'7" (Tr. 233-234).

Officer Hawley also recorded on the PD 251 form that Ledbetter was robbed of cash and other articles

of value, while Thompson had "40 cents in change taken from his front pocket." (Gov't. Ex. 3).

According to Ledbetter, Officer Hawley voiced his suspicion of Thompson's involvement during the course of his investigation on December 23, 1969 (Tr. 98-100), but Ledbetter himself did not suspect Thompson at that time (Tr. 100).

b. December 28, 1969.

On December 28, 1969, Officers Morrison and Gaines went back to Ledbetter's house with a group of ten mugshots. Two of them were shots of Clarence Watts and his brother. It was at that time that Ledbetter first identified Clarence Watts as the robber who carried the shotgun (Tr. 112-114).

The officers then went to Thompson's room and showed him the same ten mugshots. According to Officer Morrison, Thompson picked out Watts and his brother as the only individuals he knew, and stated that they were not "involved" (Tr. 114-115). Thompson testified that he told the police that he could identify none of the subjects of the mugshots as the robbers, but that one of the subjects was Watts whom he knew. He stated that he told the police that Watts was not one of the two men with guns because they had beards and he knew that Watts did not have one (Tr. 207-208, 228-229, 233).

The officers continued to interrogate Thompson extensively about the robbery, and he repeated to them in some detail his earlier account, including the fact he had been robbed of 40 cents and had walked back to the scene of the crime (Tr. 115-117).

c. January 4, 1970.

Officer Morrison sent Officers Porter and Triggs to question Thompson again on January 4, 1970 (Tr. 117, 133-134). According to Porter, the reason for the visit was "some type of discrepancy in Mr. Thompson's statements" which he learned of "through a conversation with Officer Morrison" (Tr. 134).

Thompson repeated the same account he had previously given, except that on this occasion he said that he paid thirty cents fare to ride a bus back to the scene of the crime after the robbers pushed him out of their car (Tr. 134-135, 137). When the officers remarked that he had previously stated that the robbers took his money (and that in any event the fare was thirty-two cents), Thompson replied that he had made a mistake and that the robber had given him a token for the bus (Tr. 134-135).

4. Arrest and Trial

On January 14, 1970, Thompson was arrested and charged with aiding and abetting the Ledbetter robbery.

The grand jury subsequently indicted Thompson and co-defendant Watts jointly on five counts arising out of the Ledbetter robbery. Prior to trial, Thompson's counsel moved for a severance, but the motion was denied (Tr. 7-9).

At the close of the Government's case and at the end of the trial, the court denied Thompson's motion for acquittal (Tr. 161, 238). A motion to suppress Thompson's statements to police officers was also denied (Tr. 241).

The jury found Thompson and Watts guilty (Tr. 270-271). Thompson was sentenced to imprisonment for two to eight years, the sentences to run concurrently (Judgment and Commitment form, dated February 19, 1971).

ARGUMENT

I.

THERE WAS INSUFFICIENT EVIDENCE IN THE RECORD TO ENABLE THE JURY TO CONCLUDE BEYOND A REASONABLE DOUBT THAT DEFENDANT WAS GUILTY OF AIDING AND ABETTING HIS CO-DEFENDANT, THE PRINCIPAL, IN THE OFFENSES CHARGED.

[Tr. 9, 10, 11-17, 23, 26-27, 56, 62, 66-67, 76, 90, 94, 94a, 97-98, 112-117, 125, 134-138, 161, 204-209, 219-220, 223, 226-228, 233-234; Supp. Tr. 3, 16, 19, 20, 40-42]

In this case, as in Bailey v. United States, 135 U.S.App. D.C. 95, 416 F.2d 1110 (1969) and Scott v. United States, 98 U.S.App. D.C. 105, 232 F.2d 362 (1956), where this Court reversed robbery convictions against aiders and abettors for insufficiency of the evidence, Thompson's conviction must stand entirely on the premise that he aided and abetted those who robbed Ledbetter (Tr. 10). For, as in Bailey, the "record is barren of proof that appellant was an active perpetrator of the offense." 135 U.S.App. D.C. at 97, 416 F.2d at 1112.

The Government's theory of the case is that Thompson and Watts "planned a robbery" (Supp. Tr. 3) and that Thompson "set it up" (Tr. 161, Supp. Tr. 20). According to the Government, Watts used Thompson as an "entree" into the robbery victim's apartment (Supp. Tr. 42), and then had Thompson "purposefully mislead" the

police in his account of the robbery "to take them off the trail of Mr. Watts." (Supp. Tr. 19).

"A sine qua non of aiding and abetting ... is guilty participation by the accused." Bailey v. United States, 135 U.S.App. D.C. at 98, 416 F.2d at 1113. "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'" Nye and Nissen v. United States, 336 U.S. 613, 619 (1949), quoted in Bailey v. United States, supra. A conviction on this theory cannot rest on mere "surmise and conjecture, without evidence," Bailey, supra, or even upon "grave suspicion", Scott v. United States, 98 U.S.App. D.C. 105, 107, 232 F.2d 362, 364 (1956).

Applying those criteria here, under the familiar standards governing a motion for judgment of acquittal, 2/ the evidentiary foundation for conviction of Thompson as the aider and abettor is as deficient as it was in Bailey and Scott, which involved strikingly similar facts.

2/ Curley v. United States, 81 U.S.App. D.C. 389, 392, 160 F.2d 229, 232, cert. denied, 331 U.S. 837 (1947); cf. Carter v. United States, 102 U.S.App. D.C. 227, 231-232, 252 F.2d 608, 612-613 (1957).

The record is barren of direct evidence showing that Thompson planned or participated in the robbery, as the Government concedes (Tr. 9). Nor is there any evidence that Thompson shared in the proceeds of the crime (Supp. Tr. 20). Rather, the Government's case is comprised solely of inferences drawn from the following circumstantial evidence:

(1) Thompson was present at the scene of the crime. According to Ledbetter, although Thompson was his friend and visited him frequently, on the night of the robbery he arrived at a later hour than usual and urged Ledbetter to have a drink with him (Tr. 94-94a). Ledbetter also testified that, while they were standing in Ledbetter's living room, Thompson opened the front door when he heard a knock (Tr. 15, 62). According to Ledbetter, the robbers then entered his apartment and forced him to lie face-down on the floor while Thompson lay face-up (Tr. 15-16, 66-67).

(2) Thompson told police officers that he "knew" Watts (Tr. 115) and Ledbetter testified that prior to the robbery Watts and Thompson visited Ledbetter's apartment together (Tr. 14, 97-98).

(3) In the series of police investigations subsequent to the robbery, (a) inaccuracies were found

in the description of the robber with the shotgun originally given to police (Gov't. Ex. 3), (b) Thompson's consecutive explanations of how he returned to Ledbetter's apartment after the robbery differed in minor detail (Tr. 115-117, 134-138), and (c) Thompson identified Watts as "not involved" in the robbery (Tr. 115), despite Ledbetter's prior identification of Watts as one of the robbers (Tr. 112).

This was the entire Government case against Thompson. Circumstances of this kind, it is plain, hardly bespeak guilt beyond a reasonable doubt. They are, in fact, as consistent with Thompson's position that he was an innocent bystander as it is with the Government's theory that he was an aider and abettor. See Stevens v. United States, 115 U.S.App. D.C. 332, 334, 319 F.2d 733, 735 (1963).

Bailey and Scott establish that mere presence at the scene and prior association between the alleged principal and the alleged aider and abettor, considered singly and in combination, are insufficient to sustain a conviction for aiding-and-abetting a robbery. In fact, the circumstances said to implicate the alleged aider and abettor in Bailey and Scott were far more suspicious than those here.

The Government's evidence here was only that Thompson "knew" Watts (Tr. 115) and that, according to Ledbetter, Thompson and Watts had visited Ledbetter's apartment together on one occasion (Tr. 97-98). 3/ In Scott, in contrast, the alleged aider and abettor and the principal were not only long-time acquaintances but also had been drinking together in the former's apartment earlier in the day. Later, they were seen standing together across the street from a liquor store; five minutes later the principal robbed the store. Even those circumstances, this Court held, did not permit an inference of guilty collaboration.

Nor does the evidence which the Government sought to invoke relating to Thompson's presence during the offense compel any inference whatever that he "setup" (Supp. Tr. 20) the robbery. Thompson was a drinking

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3/ Since the testimony by Thompson that he was friends with Watts and saw him frequently in the neighborhood (Tr. 226-227) was not presented during the Government's case, it cannot properly be considered in reviewing the adequacy of the evidence for acquittal at the end of the Government's case. Cephus v. United States, 117 U.S.App. D.C. 15, 324 F.2d 893 (1963).

Even considering this testimony, however, the prior association of Watts and Thompson was clearly a casual one. While Thompson acknowledged he frequently talked with Watts as the latter worked in the neighborhood (Tr. 207), and occasionally shared a drink with him (Tr. 227-228), there is nothing other than surmise to suggest that this association led to a scheme to rob Ledbetter or that they even conversed with each other during the days prior to the robbery.

companion of Ledbetter and his request to Ledbetter for a drink on December 23 was consistent with their previous pattern, differing only in the slightly later hour in the evening that he arrived (Tr. 11-14, 56, 94-94a). In view of their friendship, it was entirely logical for Thompson to open Ledbetter's door when there was a knock (Tr. 12-14).

The other material on which the Government relied is equally weak and equivocal. It was only logical that Ledbetter, as the intended victim whose apartment was robbed, be given rougher treatment than a bystander. He was not chosen as a victim at random; the robbers quickly found $1,000 in cash in his apartment (Tr. 16-17, 23).

That the robbers took Thompson with them after the robbery (Tr. 204-205) is, standing alone, meaningless. The Government speculated that "they did that because they were trying to keep suspicion out of the case so far as Mr. Thompson was concerned" (Supp. Tr. 16). But the only testimony of record was Thompson's uncontradicted statement that he was forced at gun point to go. There is no other evidence in this record relating to the abduction, and certainly nothing on which the Government could properly base its speculation. 4/

4/ An inference, equally valid and supportable, is that Thompson's abduction by the robbers was designed to discourage him from cooperating with the police in their investigation of the crime.

Finally, the alleged inconsistencies in Thompson's account of post robbery details revealed by the police investigation hardly provide the kind of clear and convincing proof needed for a criminal conviction. They do not rationally support a conclusion that Thompson participated in the offense nor that he sought to "purposely mislead" (Supp. Tr. 19) the police during their investigation.

a. According to the Form 251 (Gov't. Ex. 3) which the police officer filled out the night of the crime, partly on the basis of Thompson's account, four men were described as the principals who robbed Ledbetter's apartment, and the robber with the shotgun was described as 5'7", 150 lbs. Thompson testified at trial that five men were involved (Tr. 219), and denied that he had given the figure of four to the police, explaining that there was a fifth man in the car (Tr. 219). He also denied that he described the robber with the shotgun as 5'7", saying that he had identified the robbers with the guns as about 5'11" (Tr. 233-234). Significantly, Ledbetter testified that it was he who gave the height and weight of Watts to the police on that occasion (Tr. 76). In any event, these alleged variations in the number or size of the robbers, derived from the immediate post-

robbery interrogation, are nothing more than the most conjectural evidence tying Thompson to the scheme to rob.

b. Second, a police officer testified that when Thompson was shown mugshots of 10 people, he laid aside the shots of Watts and his brother and said they were "not involved," (Tr. 115) although Ledbetter had already identified Watts as the robber who carried the shotgun. But this conflict between defendant and Ledbetter as to whether Watts was involved does not persuasively implicate Thompson.

Ledbetter himself failed to associate Watts with the robbery until five days after it happened (Tr. 112-114, 125). Moreover, Thompson's statement that Watts was not involved is consistent with the record. Thompson testified that he knew Watts was not the robber carrying the shotgun, because (1) this robber had a beard, as he had reported to the police (See Gov't. Ex. 3) and (2) he knew Watts and Watts did not have a beard (Tr. 207-208).

But even if Thompson had falsely refused to identify Watts as the robber, this would not sustain a charge that Thompson was an aider and abettor. In his effort to explain why Ledbetter failed to identify

Watts to the police during their initial investigations (Tr. 26-27, 112-114, 125), the prosecutor told the jury that Ledbetter had a reasonable fear that identification would produce retaliation by Watts or others in the neighborhood (Supp. Tr. 40-41). Defendant, who lived in the same neighborhood, could be expected to entertain the same fears (perhaps explicitly threatened during his auto ride with the robbers after his abduction.)

c. Finally, the Government relied upon alleged changes in Thompson's story about the manner in which he returned to Ledbetter's apartment after he was taken away by the robbers. (While Thompson at first stated that he walked back, and that the robber had taken his last 40 cents, he later stated that he had ridden the bus with a token the robbers had given him). Whether Thompson walked back or rode the bus after the robbery occurred has not the slightest relevance to the commission of the robbery or any attempt to put the police off Watts' trail.

Even when a defendant was shown to have given the police a blatantly false statement on a critical issue, this Court reversed his conviction for aiding and abetting. Scott v. United States, 98 U.S. App.D.C. 105, 232 F.2d 362 (1956). Scott told police that he was not

acquainted with the robber, though in fact the two were long-time acquaintances who had been drinking together earlier in the day. Yet this falsehood, although reinforced by other evidence raising grave suspicion as to Scott's involvement, 5/ was deemed by this Court to be insufficient to sustain the conviction. A fortiori, a minor variance in an irrelevant detail of a traumatic experience is no basis for finding a defendant guilty of aiding and abetting.

In sum, the Government's case was composed of so many inferences drawn from weak and insubstantial circumstantial evidence that the prosecutor was compelled to resort to speculation in his closing argument. Aside from his conjecture on the abduction of Thompson (supra. p. 15, Supp. Tr. 16), he told the jury: "It looks -- it looks just like a set-up..." (Supp. Tr. 20, emphasis supplied). He was unable to point to a single shred of evidence that the robbery was a set-up, and the jury was in effect urged to convict on the basis of that speculation alone.

The Government's case is therefore "a prosecution constructed from evidence which is pregnant

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5/ Scott and the principal were seen talking across the street from a liquor store five minutes before the principal robbed it; the principal carried a copy of Scott's apartment address in his pocket; and the police found in Scott's apartment gun grips which matched the weapon used by the principal in the robbery.

with the probability that appellant was an innocent by-stander." Bailey v. United States, 135 U.S.App. D.C. at 100, 416 F.2d at 1115. "When scrutinized in the light of what was not shown at trial," the conjectural nature of the case against Thompson becomes, as it did against Bailey, "even more eloquent." 135 U.S.App. D.C. at 99, 446 F.2d at 1114. Here, as in Bailey, there was only surmise by the prosecutor, but no supporting evidence in the record, that Thompson planned the robbery, helped in its consummation, or directly promoted it by deliberately giving the police false information to take them off the trail of Watts.

Accordingly, this Court's reasoning and decision in Bailey on comparable facts applies with equal force here:

> We hold concordantly that the Government's ambiguous evidence against appellant left too much room for the jury to engage in speculation, with the result that the motion for judgment of acquittal was erroneously denied. The totality of that evidence could only conjecturally support a finding that appellant "associate[d] himself with the [criminal] venture, that he participate[d] in it as in something that he wish[ed] to bring about, [and] that he [sought] by his action to make it succeed." The circumstances may arouse suspicions but, as we have counseled, even "grave suspicion is not enough." [footnotes omitted]. 135 U.S.App. D.C. at 101, 416 F.2d at 1116.

II. THE TRIAL COURT ERRED IN DENYING THOMPSON'S MOTION FOR SEVERANCE WHERE THOMPSON, CHARGED ONLY WITH AIDING AND ABETTING, WAS INEVITABLY PREJUDICED BY THE FACT THAT THE EVIDENCE AGAINST HIS CO-DEFENDANT WAS MORE DAMAGING THAN THE EVIDENCE AGAINST HIM.

[Tr. 29-31, 35-38, 46-49, 88-89, 120-121, 168-170, 182, 183, 186-191; Supp. Tr. 3, 41]

Thompson and co-defendant Watts were indicted and tried jointly. Watts was charged as the active perpetrator of the offenses of burglary, assault, and armed robbery, Thompson for aiding and abetting these crimes. Watts and Thompson were seated next to each other during the trial (Supp. Tr. 3, 41), and the Government presented the cases against them as if they were interconnected.

Even before the trial began and certainly as it progressed, it was obvious that Thompson was being prejudiced by a joint trial because of the disparity between the insubstantial nature of the case against him and the convincing -- "overwhelming" to use the prosecutor's description (Supp. Tr. 21) -- against Watts. 6/

The Supreme Court has recently warned that "... [A]ll joint trials, whether of several codefendants or of one defendant charged with multiple offenses, furnish

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6/ Since there were only two defendants, and the trial of both took less than two days, "it would not [have been] very time consuming but entirely practicable to accord them separate trials." Schaffer v. United States, 221 F.2d 17, 19 (5th Cir. 1955).

inherent opportunities for unfairness ..." Spencer v. Texas, 385 U.S. 554, 562 (1967). See also Note, Joint and Single Trials Under Rule 8 and 14 of the Federal Rules of Criminal Procedure, 74 Yale L.J. 553 (1965). To remedy this infirmity, Rule 14, Fed.R.Crim.P., requires a separate trial if "it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants ...". See also Schaffer v. United States, 362 U.S. 511 (1960). "[T]he trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear." 362 U.S. at 516.

Co-defendant Watts was directly identified by Ledbetter --from photographs (Tr. 29-31, 35-38, 46, 112), in a line-up (Tr. 46-49, 120-121) and at trial (Tr. 48-49, 88-89), -- as one of the active principals of the robbery and as the man who carried the gun. Moreover, the Government relied on the fact that neither Watts nor his wife was able to offer convincing alibis as to his whereabouts at the time of the offense. According to Watts, on the night of the robbery he left his cousin's house at about 11 o'clock and came straight home (Tr. 186-189).

But the cousin did not appear as a witness, and the Government made much of the fact that both Watts and his wife were unable to remember the time of his arrival home and other relevant aspects of his activities (Tr. 168-170, 182-183, 188-191).

Since the evidence against his co-defendant was "far more damaging" than the evidence against Thompson, Thompson was "inevitably prejudiced", and the trial court abused its discretion in denying the motion to sever (Tr. 9). United States v. Kelly, 349 F.2d 720, 759 (2d Cir. 1965); cert. denied, 384 U.S. 947 (1966); accord, McHale v. United States, 130 U.S. App. D.C. 163, 164, 398 F.2d 757, 758 (1968), cert. denied, 393 U.S. 985 (1968).

In Kelly, Shuck was a stock broker who was part of a stock fraud scheme masterminded by Kelly and Hagen; Shuck's only role was to encourage the public to hold certain stock which in turn would contribute to the fraudulent transactions of Kelly and Hagen. The three individuals were indicted, tried and convicted together for stock fraud conspiracy, despite Shuck's motions to sever. The Court of Appeals reversed Shuck's conviction, holding that, since the evidence which stamped Kelly and Hagen as "unscrupulous swindlers of the first

rank" undoubtedly "rubbed off" on Shuck to his prejudice, the trial court should have granted Shuck's motion to sever. 349 F.2d at 759.

As in Kelly, the taint of Watts - identified on three occasions by Ledbetter as the robber carrying a gun - inevitably must have "rubbed off" on Thompson in the minds of the jury who saw Thompson and Watts seated next to each other throughout the trial (Supp. Tr. 3, 41). The prejudice resulting from the court's failure to sever therefore compels a reversal of the conviction below.

III. THE TRIAL COURT ERRED IN FAILING ADEQUATELY AND CLEARLY TO INSTRUCT THE JURY THAT THE EVIDENCE AGAINST THOMPSON AND THE ISSUE OF HIS GUILT AS AN AIDER AND ABETTOR SHOULD BE CONSIDERED SEPARATELY FROM THE CASE AGAINST WATTS, THE PRINCIPAL

[Tr. 251-268]

The trial court erred not only in failing to sever the trials of the two defendants, but also in instructing the jury in such a way that the cases of Thompson and Watts were inevitably joined in the jury's mind. The court failed to explain the differing roles of Thompson and Watts, to identify which evidence related to which defendant, and adequately to explain that the guilt of each had to be separately considered. In a

case having a strong potential for prejudice against Thompson, not only did the instructions fail properly to differentiate between the two defendants, but they may well have contributed to blurring their roles.

In a joint trial, as the Supreme Court has emphasized in Blumenthal v. United States, 332 U.S. 539, 559-560 (1947), there is a particularly critical need for safeguards as "impregnable as possible" to guard against the dangers of guilt by association:

> "Perhaps even at best the safeguards provided by clear rulings on admissibility, limitations of the bearing of evidence as against particular individuals, and adequate instructions, are insufficient to ward off the danger entirely. It is therefore extremely important that those safeguards be made as impregnable as possible." (Emphasis supplied).

See also Bruton v. United States, 391 U.S. 123 (1968) and cases cited therein; cf. Schaffer v. United States, 362 U.S. 511, 515 (1960). The "closeness" of the issue against Thompson here "imposed an obligation on the trial judge to instruct the jury with extreme precision...." United States v. Garguilo, 310 F.2d 249, 254 (2d Cir. 1962), citing Glasser v. United States, 315 U.S. 60, 67 (1942).

At no time during the trial did the court caution the jury that evidence relating to Watts alone

had no bearing on Thompson's guilt. It failed to do so when Ledbetter and the police officers identified Watts as an active participant in the robbery. Nor did it caution the jury that any inference drawn from the inability of Watts and his wife to account for Watts' whereabouts at the time of the offense should not be considered in assessing Thompson's guilt.

In the circumstances of this case, the absence of instructions which clearly differentiated the defendants for the jury was particularly prejudicial. As we have pointed out, the evidence against Watts was compelling and that against Thompson "paper thin". Cf. Jones v. United States, 119 U.S.App. D.C. 213, 214, 338 F.2d 553, 554 (1964).

Yet the Court's instructions created the impression that the defendants were inseparably joined. The Court recited for the jury the general legal elements necessary to convict a defendant of aiding and abetting (Tr. 252) 7/, and completed the charge made by reading the indictment and the pertinent statutory provisions (Tr. 253-265). But it never applied this "rather abstract"

7/ "So, too, if one person aids or abets, that is, assists or helps another person in the commission of a crime, the person so aiding and abetting is guilty of the completed offense as though he had committed it entirely." (Tr. 252).

(United States v. Garguilo, 310 F.2d at 254) recital of the law to the facts of this case, nor did it point out to the jury which of the evidence related to Thompson as the aider and abettor and which to Watts. See Schaffer v. United States, 362 U.S. 511, 515 (1960) where the Supreme Court sanctioned a joint trial only because the charge "meticulously set out separately the evidence as to each of the [defendants] and admonished the jury that they were 'not to take into consideration any proof against one defendant and apply it by inference or otherwise to any other defendant.'"

Moreover, neither before, during, or after this recitation of legal principles did the Court point out that Thompson was charged as the aider and abettor, and that it was Watts who was charged as a principal. And it continued to blur the distinction between the roles of Watts and Thompson in the instruction relating to alibi and presence at the scene:

> "There has been testimony to the effect that the defendant was not present at the time and place where these offenses were committed.
>
> The defense of alibi is a legitimate, legal and proper defense." (Tr. 251, emphasis added).

Though this instruction was intended to refer to Watts, the Court did not so state. In addition, the Court went

on to indicate that one of the essential elements of the offense which the Government was required to prove beyond a reasonable doubt was that "the defendant was present at the time and place of the commission of the offenses charged in the indictment..." (Tr. 251), and that, absent this element, the jury should find "the defendant" not guilty. 8/ Again, there was no reference to Watts even though these instructions obviously related to him. Since there was no dispute about the fact that Thompson was present at the scene, the generalized and confusing reference to "the defendant" in the context outlined above may well have suggested to the jury that Thompson's mere presence at the scene was sufficient to convict. Cf. Bailey v. United States, 135 U.S.App. D.C. 95, 416 F.2d 1110 (1969); United States v. Garguilo, 310 F.2d 249, 254 (2d Cir. 1962).

The implication of this reference was never countered. "Never were the jurors told in plain words that mere presence and guilty knowledge on the part of [Thompson] would not suffice unless they were also convinced beyond a reasonable doubt that [Thompson] was doing something to forward the crime -- that he was a

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8/ The Court continued to refer indiscriminately to "the defendant or an aider and abettor" (Tr. 255,256, emphasis supplied).

participant rather than merely a knowing spectator." United States v. Garguilo, 310 F.2d at 254; Cf. Drew v. United States, 118 U.S.App. D.C. 11, 331 F.2d 85 (1964) (confusion in jury's mind resulting from joinder of offenses.)

After the initial charge was completed, the two alternate jurors excused, and the jury informed that it could begin its deliberations (Tr. 265), the Court told the jury that the guilt or innocence of each defendant had to be separately considered (Tr. 267). But this again was only a generalized instruction, which suffered from the same defects as the introductory part -- it failed to compartmentalize the proof as to Thompson and Watts. 9/ Moreover, given somewhat as an afterthought, it may well have been disregarded or minimized by the jury. Lacking in precision, it was hardly adequate to cure the harm resulting from the earlier charge.

The failure of the Court to instruct meticulously on the separate roles of Thompson and Watts makes it likely that the stronger case against Watts, who is said to have carried the shotgun, "rubbed off" on Thompson.

9/ "Under Count one of the indictment you may find the defendant Watts not guilty of committing first degree burglary while armed or guilty, and then you would consider as to defendant Thompson and you may find him not guilty of committing first degree burglary while armed or guilty." (Tr. 267).

United States v. Kelly, 349 F.2d 720, 759 (2d Cir. 1965), cert. denied, 384 U.S. 947 (1966). Unconfined by a Court instruction drawing distinctions between the two defendants, the taint of the stronger case against Watts denied Thompson "the right of every defendant to stand or fall with the proof of the charge made against him, not against somebody else", United States v. Toner, 173 F.2d 140, 143 (3d Cir. 1949).

In light of the inherent opportunity for guilt by association in a joint trial, particularly where, as here, the case against the principal was much more convincing that that against Thompson, the failure of the trial court properly to instruct the jury as to the separate and individual roles of each had, without doubt, a prejudicial -- and perhaps determinative -- impact upon the jury's fact finding function. See United States v. Wharton, ____ U.S.App. D.C. ____, 433 F.2d 451, 456-457 (1970); see also Green v. United States, 132 U.S.App. D.C. 98, 405 F.2d 1368, 1369 (1968).

The inadequacy of the instructions thus amounted to plain error under Rule 52(b), Fed.R.Crim.P., and warrants

reversal here, just as it did in similar circumstances in United States v. Garguilo, 310 F.2d 249 (2d Cir. 1962); see also United States v. Wharton, supra.

IV. THE COURT ERRED IN PERMITTING THE JURY TO CONSIDER POLICE TESTIMONY ABOUT DEFENDANT'S STATEMENTS ELICITED DURING CUSTODIAL INTERROGATION WITHOUT THE WARNINGS REQUIRED BY MIRANDA v. ARIZONA

[Tr. 98-100, 112-118, 133-135, 208, 220, 238-241; Supp. Tr. 8, 19; Morrison's Affidavit in Support of Arrest Warrant of Thompson, 3; Police Report of February 24, 1970, 2]

Officer Morrison's testimony was that on December 28, 1969, five days after the robbery, he and Officer Gaines interrogated Thompson in his room about the robbery (Tr. 114-117). According to Morrison, Thompson told the officers that "he had walked uninjured back to the scene of the crime . . ." (Tr. 117). On January 4, 1970, Officer Porter testified, Thompson told Officers Porter and Triggs that he "caught a bus" back to the scene of the crime (Tr. 134). When asked what he used for the fare, Thompson replied, "thirty cents." (Tr. 135). The police then recalled that he had previously said that he had been robbed of all his money and that, in any event, the bus fare was thirty-two cents; Thompson replied, according to Porter's testimony, that he had "made a mistake" and that the robber had given him a token to ride the bus (Tr. 135).

As set out in Argument I, this seemingly trivial variation in Thompson's account, as related by the police, was considered by both police and prosecutor a damaging piece of circumstantial evidence which implicated Thompson. In this close case, the court clearly erred in denying Thompson's motion, made at the close of the case, to strike the police testimony and to bar all inferences drawn from it based on Miranda v. Arizona, 384 U.S. 436 (1966)(Tr. 238-241).

A. The Statements Elicited From Defendant Were Covered By Miranda Principles.

In Miranda, the Supreme Court barred use of any statements, confessions, or admissions, "whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. at 444. As the Court pointed out:

> No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.' 384 U.S. at 476-77.

Truly exculpatory statements, said the Court, would never be used "by the prosecution, and statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word." 384 U.S. at 477. 10/

Accordingly, all statements elicited during a custodial interrogation are inadmissible unless the procedural safeguards listed in Miranda are employed: the individual is warned of the right to remain silent, and the warning is accompanied by an explanation that anything said can be and will be used against the individual; the individual is informed of his right to consult with a lawyer, to have counsel present during the interrogation, and to have a lawyer appointed if he is indigent. 384 U.S. at 467-73. None of these safeguards was used here.

10/ The Court's denial of the motion to suppress the police testimony about the December 28 and January 4 interrogations because of the absence of Miranda warnings was based on the view that defendant's statements did not constitute a "confession" but were "simply statements that turned out to be ... contradictory statements, self contradicted ones" (Tr. 239). In urging denial, the prosecutor characterized the statements as "exculpatory" (Tr. 240). These comments obviously reflected erroneous views of Miranda.

B. Thompson Was Subjected To Custodial Interrogation During the Police Visits to His Room.

The primary concern of Miranda was the "potentiality of compulsion" inherent in an in-custody interrogation where the defendant was surrounded by "antagonistic forces." 384 U.S. at 457, 461. Miranda thus covers "custodial interrogations", which the Court defined as "questioning inititated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. 11/

Though there is, of course, no "litmus paper test" for determining when custodial interrogation has occurred, United States v. Robinson, ___ U.S.App. D.C. ____, 439 F.2d 553, 569 (1971), the principles set forth in Robinson, Orozco v. Texas, 394 U.S. 324 (1969), and Allen v. United States, 129 U.S.App. D.C. 61, 390 F.2d 476 (1968), modified 131 U.S.App. D.C. 358, 404 F.2d 1335 (1968) clearly demonstrate that the circumstances of police questioning here constituted custodial interrogation. In Allen, this Court held the relevant Miranda inquiry to be whether the police were

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11/ The trial court did not rule whether the police visits to Thompson in the present case constituted "custodial interrogation" because it held only confessions, not contradictory statements, to be subject to Miranda guidelines.

"reacting to a street scene and trying to run down the facts", or were "staging an interrogation that had focused on a subject." 390 F.2d at 479.

This standard was further refined in the recently-decided Robinson case. There, a brutal murder occurred on the grounds of St. Elizabeth's Hospital. Three police officers interviewed the defendant because he had been committed to the hospital as a result of an incident closely paralleling the case under investigation. At the interview, the police noticed scratches on the defendant's arms which aroused their suspicions, and they began to ask the defendant about his whereabouts at the time of the murder. 439 F.2d at 556. The police testified that the defendant was "not in custody" and at the time they "had no intention of arresting" the defendant. 439 F.2d at 556. Nevertheless, this Court held that "the interrogation had sufficiently focused on the appellant [defendant] to cause the absence of the Miranda warning to bear upon any confession which followed." 439 F.2d at 559.

The chronology of events in this record similarly shows that the police had focused on Thompson as a suspect at the time of their December 28 and January 4 visits to his room, if not before, and that their questioning

at this time constituted custodial interrogation within the meaning of Miranda and cases following it.

1. On the night of the offense itself, December 23, 1969, the police already regarded Thompson as a principal suspect -- "the head man" -- involved in the crime. Mr. Ledbetter, the complaining witness, testified that the police officer who investigated the robbery on the night it occurred identified Thompson at that time as the "head man causing me to be handled like that -- causing me to get robbed" (Tr. 100). Ledbetter testified on cross-examination (Tr. 98-100):

> Q. Well, on the evening after the incident [December 23, 1969] when Mr. Thompson [the defendant] had returned to your home and you were giving a description of the people who had been in your apartment to the police, did you at that time say to the police it is the same man that was with Mr. Thompson at my house a short time ago?
>
> A. No, no.
>
> The police came there and William [Thompson] said he had to go and pick up his wife and the police told me that that's the man right there.
>
> Q. Oh, the police told you that's the man?
>
> A. That's the man right there . . . .
>
> THE COURT: What did the policemen --

THE WITNESS: Told me that's the man right there.

THE COURT: Whom did they mean?

THE WITNESS: William . . . .

THE COURT: You said that you had been talking to the police.

THE WITNESS: William told the police that I am going to pick my wife up, be back.

And then William left the police told me that's the man right there.

BY MR. REILLY [defense counsel]

Q. That is the man right there what?

A. William that's what they told me.

Q. What did they mean by that?

A. William was the head man causing me to be handled like that -- causing me to get robbed.

Q. And up to that point had you suspected anything like that?

A. No, no.

2. During the next several days, according to a police report, an informer told the police that Thompson's daughter received many expensive gifts for Christmas -- two days after the robbery -- Thompson's lack of means of support notwithstanding (Morrison's Affidavit in Support of Arrest Warrant of Thompson, 3). 12/ On December 26, 1969, the police went to Thompson's

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12/ This information derived from the informer was not presented to the jury and is therefore irrelevant to Argument I, supra. It does, however, bear on the issue whether the police interrogated Thompson as a suspect on December 28th and January 4th.

room where he told his account of the robbery to Officer Morrison; his account agreed with that given Morrison by Ledbetter (Police Report of February 24, 1970, 2). Two days later, on December 28, 1969, Officers Morrison and Gaines again returned to Thompson's room and brought with them ten mugshots (Tr. 115). Known to these officers but undisclosed to Thompson, one of the ten subjects of the mugshots (Watts, the co-defendant) had previously been identified by Mr. Ledbetter and by a reliable informer as one of the active principals in the robbery (Tr. 112-114). According to police testimony, Thompson picked out the mugshot of Watts (along with one other) and told Morrison and Gaines that those individuals were <u>not</u> involved and that he knew them (Tr. 115).

Thompson's failure to identify Watts at this time as the prime offender apparently served to confirm their earlier suspicions about Thompson's involvement. According to Thompson's uncontradicted testimony, the police told him at this point: "[Y]ou be careful in what you say, Mr. Thompson, because if you help us, we will help you." (Tr. 208). Then, even though Officer Morrison had questioned Thompson extensively about the robbery only two days before, after Thompson identified the mug-

shots, Morrison asked Thompson to repeat his story (Tr. 115). He said again that he had been pushed out of the robbers' car and had walked back to the scene of the crime (Tr. 117).

3. After leaving Thompson's home on December 28th, Morrison asked two fellow officers to make another visit to Thompson's room (Tr. 118). Officer Porter testified that the purpose of this fourth interview with Thompson was to "confront" him with the "discrepancy" in his previous statements (Tr. 134). On January 4, 1970, Officers Porter and Triggs returned to Thompson's room and confronted him with inconsistencies about the method by which he returned to the scene of the crime (Tr. 133-134). Officer Porter testified (Tr. 134-135):

> Mr. Thompson told me that once being kicked out of the vehicle he was uninjured and that he caught a bus from that location back to his residence.
>
> So I asked Mr. Thompson what he used for bus fare. He stated he used thirty cents.
>
> I called Mr. Thompson's attention to his original statement he made in the offense report where as he stated forty cents was taken from him, since he only had forty cents.
>
> I believe Officer Triggs asked him how could he ride the bus for thirty cents and the bus fare was thirty-two cents.

> Mr. Thompson stated to us that
> he made a mistake, and that
> the robber gave him a token to
> ride the bus back to his residence.

The record thus leaves no doubt that the purpose of the final two police visits on December 28 and January 4 was to interrogate a suspect, not merely to conduct investigative fact-finding.

In view of Thompson's lack of education and limited ability, his statements to police could not have been offered voluntarily. Compare Culombe v. Connecticut, 367 U.S. 568 (1961) (mental defective) and Crooker v. California, 357 U.S. 433 (1958)(former law school student). Thompson is a 56-year old semi-illiterate (Tr. 220) ex-South Carolina sharecropper; he had spent over thirty years in South Carolina prisons following a trial for manslaughter at which he was not afforded counsel. The need for the procedural protection afforded by Miranda was thus particularly acute.

Moreover, the police interrogation on the two occasions in question took place in Thompson's boarding house room in which Thompson was alone in the presence of two police officers, as in Orozco v. Texas, supra. As the excerpts from the testimony of Ledbetter, Morrison

and Porter -- all Government witnesses -- demonstrate, the police interrogated Thompson with intensity and adversary skill. Surely on these occasions the police were "antagonistic forces" confronting Thompson with imposing authority in a police dominated atmosphere in which his freedom of action was significantly curtailed.

The case at bar is analogous to a recent Seventh Circuit decision, United States v. Campos-Serrano, 430 F.2d 173 (7th Cir. 1970). There two Immigration Service agents arrived at a room occupied by three Mexican-Americans, one of whom was the defendant. The agents told the defendant that one of his roommates had been arrested and asked to see his alien registration documents. The agents examined the documents, returned them, and departed. Shortly thereafter, the agents returned with the second roommate in their custody and asked the defendant to produce his documents a second time. This time, the agents noticed the documents were altered and arrested the defendant; the documents were later admitted as evidence against him at trial. The Court of Appeals reversed, holding that the circumstances of the request "created an overbearing atmosphere which was sufficient to satisfy the requisite degree of compulsion" under Miranda. 430 F.2d at 178.

Courts of Appeals in other circuits have reached the same conclusion in cases involving similar facts. See United States v. Bekowies, 432 F.2d 8 (9th Cir. 1970); United States v. Lackey, 413 F.2d 655 (7th Cir 1969); United States v. Dickerson, 413 F.2d 1111 (7th Cir. 1969); Agius v. United States, 413 F.2d 915 (5th Cir. 1969); cert. denied, 397 U.S. 992 (1970); Windsor v. United States, 389 F.2d 530 (5th Cir. 1968).

There was no testimony whatsoever by the police officers that they did not consider Thompson a suspect during their visits of December 28th and January 4th. Accordingly, there is no support in this record for a finding that the Government satisfied its burden of showing beyond a reasonable doubt that Thompson's statements were not the result of custodial interrogation. Cf. Jackson v. Denno, 378 U.S. 368 (1964); Pea v. United States, 130 U.S.App. D.C. 66, 397 F.2d 627, 637 (1968) (en banc). 13/

C. Reliance on The Police Testimony Was Prejudicial Error

Reliance on the police testimony about the December 28th and January 4th statements by Thompson was inevitably damaging and prejudicially erroneous. See

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13/ If this Court should conclude that defendant has not adduced sufficient evidence on the Miranda issue to justify a reversal, the case should be remanded for a hearing on that issue.

United States v. Bekowies, 432 F.2d at 14, n.6. In a case as speculative against Thompson as was this one (see Argument I), each piece of testimony relating to contradictory statements by Thompson during police interrogation undoubtedly had a strong influence on the jury's verdict. See Chapman v. California, 386 U.S. 18, 23-24 (1967).

Moreover, the Government made every effort to capitalize on these alleged contradictions. In his opening statement, the prosecutor said (Supp. Tr. 8):

> The evidence will also show that after the police eventually went back to Mr. Thompson again and talked to him about what happened in this robbery and he told a different story about what these men had done with him after they left the apartment.

In closing argument, the Government again highlighted the post-robbery stories (Supp. Tr. 19):

> . . . you heard the police officers testify about how he varied his story about what happened to him after he was taken from Mr. Ledbetter's house [the scene of the crime] two or three times when they talked to him.

The prosecutor added: "... I think you can draw the inference that Mr. Thompson was purposely misleading the police in this case. He got back there and he was giving information to take them off the trail of Mr.

Watts" (Supp. Tr. 19). The evidentiary foundation for this "inference" would have to be found by the jury in the police testimony of Thompson's statements to them on December 28, 1969, and January 4, 1970.

There is therefore a strong probability that the evidence complained of, as well as the inferences drawn from it by the prosecutor, contributed to the conviction. Without it, "honest, fair-minded jurors might very well have brought in not-guilty verdicts." Chapman v. California, 386 U.S. 18, 26 (1967). Thus denial of the motion to strike and to bar all inferences drawn from the police testimony was prejudicial, and the conviction should be reversed.

CONCLUSION

The insubstantial and tenuous character of the case against Thompson requires reversal of the conviction with directions to enter a judgment of acquittal for insufficiency of the evidence.

In any event, the case must be reversed for a new trial because of procedural errors which, either singly or in their cumulative impact, deprived Thompson of a fair trial.

Respectfully submitted,

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Dated: June 21, 1971.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1169

UNITED STATES OF AMERICA, *Appellee*,

v.

WILLIAM THOMPSON, *Appellant*.

No. 71-1284

UNITED STATES OF AMERICA, *Appellee*,

v.

CLARENCE WATTS, JR., *Appellant*.

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
EDWIN A. WILLIAMS,
JULIUS A. JOHNSON,
Assistant United States Attorneys.

Cr. No. 468-70

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* Cases chiefly relied upon are marked by asterisks.

Issues Presented *

In the opinion of appellee, the following issues are presented:

I. Was the evidence sufficient on aiding and abetting to support appellant Thompson's conviction?

II. Was the motion of appellant Thompson to sever the trial properly denied?

III. Did the trial court adequately instruct the jury to separately consider the evidence of guilt as to each defendant?

IV. Were statements of appellant Thompson during police interview inadmissible under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), where appellant had represented himself as a victim of the instant robbery and was so regarded by police officers during the early stage of investigation?

V. Did appellant Watts suffer any prejudice in the prosecutor's rebuttal argument by a single, isolated, and apparently inadvertent reference to two witnesses, both mentioned in testimony, that appellant had apparently proposed to call during the trial but did not?

VI. Was the evidence sufficient to justify jury consideration on the identification of appellant Watts by the complainant, who had known him for several years, though not by name, and had seen him often?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1169

UNITED STATES OF AMERICA, *Appellee,*

v.

WILLIAM THOMPSON, *Appellant.*

No. 71-1284

UNITED STATES OF AMERICA, *Appellee,*

v.

CLARENCE WATTS, JR., *Appellant.*

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellants were tried by jury November 16-17, 1970 before Judge June Green upon a five-count indictment charging first degree burglary while armed (22 D.C. Code §§ 1801 (a), 3202), first degree burglary (22 D.C. Code § 1801(a)), armed robbery (22 D.C. Code §§ 2901, 3202), robbery (22 D.C. Code § 2901), and assault with a dangerous weapon (22 D.C. Code § 502). Found guilty of first degree burglary while armed (count 1), armed robbery (count 3), and assault with a dangerous weapon (count 5), appellants were later sentenced to terms of imprisonment of two to eight years on each offense, to be served concurrently.

The offenses arose from the late evening entry of several unmasked armed men into the apartment of William Ledbetter at 1700 Eighth Street, N.W. on December 23, 1969 while he was socializing with a friend of a few months, appellant Thompson, who later became implicated in the robbery through police investigation. One of the armed men was identified as appellant Watts, whom complainant Ledbetter had seen for several years in the same neighborhood and who had in fact visited the complainant's apartment on one occasion [1] before the robbery when appellant Thompson brought him there (Tr. 11-14).

Government Evidence

Complainant Ledbetter testified that on the night in question he retired early around 9:00 p.m. in anticipation of working the next day, and was awakened a couple hours later by a knocking, which persisted, at his bedroom window. After a while he recognized appellant Thompson, who visited him socially before but usually much earlier around five o'clock or so when Ledbetter would come in from work. They would talk about various jobs and the possibility of getting one for Thompson. Thompson had never come this late before, but indicated he wanted a drink (Tr. 11, 14, 15, 54-56, 94a). After complainant admitted appellant Thompson to the apartment, it was realized that Thompson had a bottle of whiskey of his own which he offered complainant who refused (Tr. 15, 57, 95-96). Soon appellant Thompson stated he heard a knock at complainant's door, and though complainant was in the same room and heard nothing, Thompson unlocked the door and opened it, admitting two armed men (Tr. 15, 16, 62-64, 105). One with a shotgun, identified as appellant Watts, ignored Thompson and ran directly to complainant and pointed the shotgun at him, which permitted a "good look" at Watts' face before complainant complied with an order to lie on the floor (Tr. 15, 66-68). While appellant Thompson complied with this

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[1] Although he stated it was about two days before the robbery at one point (a Sunday evening, Tr. 13-14) and later indicated it might have been three weeks, he did not know the exact time (Tr. 84).

order also, unlike complainant, he was allowed to lie on the floor with his face upward (Tr. 16, 67, 68). Complainant Ledbetter's hands were then tied behind his back and he was left alone in his bathroom while his apartment was ransacked (Tr. 16, 69, 71, 73). Before the men left, appellant Watts told complainant that Thompson would be taken with them (Tr. 17, 19, 72).

After they left, complainant Ledbetter untied himself and, unable to use his telephone because the wire had been clipped, ran to a neighbor's house across the street where he called the police (Tr. 17, 19, 73, 105). About the same time that he returned to his apartment, some ten minutes later, the police and Thompson arrived. During the police investigation at the apartment complainant Ledbetter was unable to tell police much about the robbers or what had happened because he was still extremely upset ("I was nervous and scared to death") and concerned about the property that had been taken. Thompson however did give descriptions of the men (Tr. 19-20). Complainant ascertained that a wall clock, television set, sportcoat, boots, and about nine hundred dollars (representing savings over two years) from a foot locker, had been taken. Also about a hundred dollars from his pants on a chair was missing (Tr. 23, 17, 22-23, 52-53, 103).

Several days later (December 28) complainant Ledbetter was shown several photographs by the police and he identified appellant Watts from them (Tr. 23-24). Complainant indicated he had a "good look" at appellant Watts' face and had known him, not in a familiar sense, since Watts was a "small boy", who at one time lived in the same neighborhood (on Seventh Street, N.W.). He did not immediately realize this during the offense because of his upset condition (Tr. 64, 77, 108, 110).[2]

Complainant testified that he had known Watts' father (Tr. 108), had seen Watts frequently visiting Jerry Williams (and others) who lived across the hall from him in

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[2] Concerning complainant's knowledge of Watts' identity, see also the testimony of complainant out of the presence of the jury after a challenge to the validity of the photographic identification (Tr. 27-34).

the same apartment building and it was this person that gave complainant, in the presence of a police officer, Watts' full name the same night of the robbery (Tr. 80-83). After the robbery, complainant recalled that appellant Watts was with appellant Thompson and his family in his very apartment some time before (Tr. 84, 88, 87-98). Complainant admitted that he did not realize right away "what was going on" and might not have related this information to the police immediately (Tr. 101-102), but he did shortly thereafter ("the next day everything was coming back to me") (Tr. 88).

A short time later complainant Ledbetter attended a lineup and identified the robber, appellant Watts, that wielded the shotgun (Tr. 46-49).

Officer John D. Hawley, who arrived on the scene shortly after the report of the holdup, interviewed complainant Ledbetter and appellant Thompson primarily for the purpose of obtaining information so that descriptions of the holdup men could be broadcast as quickly as possible (Tr. 140A-142). Most of the information relating to the descriptions that Officer Hawley reported came from appellant Thompson,[3] because complainant Ledbetter appeared "very well confused, disoriented" and "nervous" (Tr. 143, 145, 148). While it was almost impossible to get descriptions from complainant, who was going back and forth in the apartment to determine what was missing, Officer Hawley was able to ascertain from him the property taken. It included a portable television set, wall clock, watch, $900 from a footlocker, and $112 from his pants (Tr. 145, 148-149, 154). Appellant Thompson reported that forty cents had been taken from him (Tr. 145-146).

Officer Sammie Morrison, a member of one of two teams of officers investigating this case, interviewed complainant on December 26 and 28, 1969 (among numerous times) and on the latter date showed him ten photographs from which he identified appellant Watts (Tr. 112, 114, 128). The same

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[3] Appellant Thompson reported four Negro males were involved in the robbery, but he could provide a description on only two, which was related in the officer's testimony (Tr. 143-144).

day the same procedure was followed in an interview with appellant Thompson, and upon his inspection of the photographs two, including one of Watts, were set aside since they depicted persons Thompson said he knew and who were not involved in the holdup (Tr. 115). Thompson also gave Officer Morrison a report of the holdup and in his narrative he indicated that the holdup men (two came into the apartment and two were in a car parked nearby) took forty cents from him and took him hostage, with expressions about killing him, because he had so little. Officer Morrison stated that Thompson further related however, that the men pushed him out of the moving car at some point and he walked back to complainant's apartment where the police officers were taking a report (Tr. 115-116, 117).

After the interview with Thompson, Officer Morrison showed the photographs again to complainant Ledbetter and again the same identification (of Watts) was made (Tr. 117).

At the lineup on January 15, 1970, Officer Morrison testified that complainant identified Watts though he read the numeral on his identifying card as a six rather than a nine. (Tr. 118-120). The identification however also included describing Watts' shirt and giving his position in the lineup (Tr. 118-121, 129).

It was thought necessary to have another interview with Thompson so Officer James W. Porter, on the second team investigating this case, interviewed him on January 4, 1970 and had him give a detailed account of the holdup (Tr. 117, 133-134). In doing so, Thompson indicated that after being pushed out of the car he caught a bus back to complainant's place, paying his fare with thirty cents. When asked about his previous statement that his only money, forty cents, was taken from him and about his being able to ride the bus for thirty cents when the fare was thirty-two cents, Thompson admitted that he had made a mistake and that one of the robbers had given him a bus token (Tr. 134-135). Officer Porter testified that he became suspicious of Thompson when he personally heard this discrepant account of events (Tr. 134-135).

Appellants' Defense

Appellant Watts interposed an alibi defense. Sylvia Watts, his wife, testified that appellant Watts left home, 1747 Eleventh Street, N.W., between 6:00 and 7:00 p.m. on the day in question, telephoned her around 10:30 p.m., and returned home around 11:00 p.m., at which time he snacked and watched television (Tr. 162, 164-165, 168, 170). She knew appellant Thompson, a good friend of her husband, who lived around the corner from their place (Tr. 172).

Appellant Watts, a twenty-eight year old self-employed mechanic, testified himself to as much, indicating he arrived home around 11:05 or 11:10 p.m. (Tr. 174-175, 183-184). He was not at the complainant's residence, a half block away, on this particular night. Though he did know complainant personally, he had been to his apartment on two indefinite prior occasions, once with one "Leo" who obtained "credit liquor" from the complainant, and the other time with appellant Thompson, his (Thompson's) wife and daughters, for social purposes (Tr. 178-179). Moreover, he was often in the apartment building as he did work for various tenants, including one "Jerry" who lived across the hall from complainant (Tr. 177).

Appellant Thompson, fifty years of age, testified that after he left work around 10:30 p.m., he eventually went to complainant's residence for a "drink" and there he knocked on the window for about five minutes before being admitted (Tr. 199-201, 211-214). Complainant gave him some "Old Grand Dad" and appellant, stating he only had $2.40, gave complainant $2.00 for the liquor, and 50 cents (?) on an "old bill" of $10 (Tr. 201-202). Shortly after appellant Thompson retired to a chair and complainant got a can of beer there was a knock on the door which complainant answered (Tr. 202, 214, 215). Then two men forcibly entered the apartment. One carried a shotgun and the other, covering appellant Thompson, had a pistol (Tr. 202, 218). Both complied with orders to lie on the floor (Thompson with his face down), but complainant Ledbetter was carried to the bathroom about the time that two other men entered (Tr.

203-204, 217). After a while Thompson was taken to a car (with a fifth man—the driver) and forty cents was taken from him (Tr. 205, 216). Although there was some discussion among the men about "[l]etting him [Thompson] drink some of this water out of this river over here", *i.e.*, "throw[ing] . . . him in the river", he was shoved out of the car at Third Street and Rhode Island Avenue, N.W., from which vicinity he returned by bus to complainant's apartment with a token given him by the robbers (Tr. 205-206). Soon complainant and police officers came to the apartment and because complainant seemed upset ("going back and forth"), he (Thompson) was asked about the holdup, resulting in his giving an account of the robbery and descriptions of the robbers (Tr. 207-208).

On another occasion, police officers showed him photographs from which he selected one of appellant Watts, indicating he was definitely not involved in the holdup as he had known him for over four or five months through his (Watts') work on cars in the neighborhood (in the back of Thompson's house) (Tr. 207, 226). While he saw Watts practically every day and considered him a friend ("I really like him"), he was not able to identify any photograph of Watt's brother as being involved in the holdup since he did not know him very well.[4] (Tr. 207, 209-210).

ARGUMENT

I. The evidence of appellant Thompson's participation in the robbery was sufficient to sustain his convictions. (Tr. 12-16, 19, 50, 54-57, 62, 67-68, 74, 95-96, 115-116, 134-135, 158-159, 161, 201-206, 214-216, 221, 224, 229-230)

Appellant Thompson claims that the evidence was insufficient on aiding and abetting to support his conviction (Thompson's br., pp. 10-21), or apparently to even warrant jury consideration (Br., p. 11). The evidence was ample for both.

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[4] Though appellant Thompson was positive appellant Watts and another person were not involved in the holdup, he admitted there were three holdup men he could not fully observe (Tr. 229-230, 232-233).

The evidence must be viewed in the light most favorable to the Government, making full allowance for the right of the jury to assess the credibility of witnesses and to draw justifiable inferences of fact from the evidence adduced at trial. *E.g. Glasser* v. *United States,* 315 U.S. 60, 80 (1942); *Curley* v. *United States,* 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied,* 331 U.S. 837 (1947); *Morton* v. *United States,* 79 U.S. App. D.C. 329, 147 F.2d 28, *cert. denied,* 324 U.S. 875 (1945); see *Thompson* v. *United States,* 132 U.S. App. D.C. 38, 405 F.2d 1106 (1968). Any claim of course that the trial judge should have granted a motion for judgment of acquittal must be premised on the proposition that at the close of the Government's case, or of all the evidence, there was nothing linking appellant Thompson with the robbery which would permit a reasonable jury to find him guilty. *E.g., Bailey* v. *United States,* 135 U.S. App. D.C. 95, 416 F.2d 1110 (1969); *Thompson* v. *United States, supra; Curley* v. *United States, supra.* Such an argument here must defy the record evidence which shows that appellant Thompson knowingly associated himself in a criminal venture and sought by his presence, and his actions, to make it succeed. *Nye & Nissen* v. *United States,* 336 U.S. 613 (1949); *Bailey* v. *United States, supra.* In our view, the principal's (Watts') identification in the robbery makes his criminality virtually unassailable and appellant Thompson's is nearly so. It is apparent that this was not a situation akin to a street robbery where the time of night and circumstances of the victim might just happen to inspire the criminal act. This was an obviously planned robbery, and as appellant Thompson concedes, complainant Ledbetter, asleep at home, "was not chosen as a victim at random." (Thompson's br. p. 15). Appellant Thompson, who enjoyed Ledbetter's friendship, either participated in the selection of Ledbetter as the victim or knowingly facilitated the perpetration of the robbery upon him, or both, as the simple evidence showed. What is more, his involvement in the execution of the plan is apparent throughout, from his "setting up" the victim to his attempted protection of one of its perpetrators, appellant Watts. Thompson's role is so clear that one could

hardly realistically suggest that certain crucial events were merely fortuitous.

To begin, Thompson went to Ledbetter's house around 11:00 p.m., two days before Christmas,[5] much later than he usually did,[6] and finding Ledbetter apparently asleep, he persisted, for no urgent reason it develops, in the knocking on the bedroom window (Tr. 14, 50, 54-55). Eventually, Ledbetter recognized Thompson, determined that he merely "wanted a drink", and admitted him to his apartment (Tr. 15, 56). It developed however, that Thompson had his own bottle from which he offered Ledbetter a drink. Having accomplished the crucial entry, Thompson soon heard a knock upon the door—Ledbetter heard nothing—and before his host could determine who might be at his door at this late hour Thompson *unlocked* the door and *opened* it *himself*, thus permitting his armed comrades to enter and subdue the unsuspecting complainant (Tr. 15, 57, 62, 74, 95-96). Naturally to make his disassociation with the robbers apparent, he, as well as complainant complied with their command to lie on the floor, but interestingly, the unmasked robbers permitted him to lie with his face upward, permitting observation of them and their activities in the apartment, while complainant was forced to lie with his face against the floor (Tr. 15-16, 67, 68). To further betray the crudeness of their plans in the discrimination between the "victims," complainant, apparently unlike Thompson, was bound and taken to a bathroom where he was forced to remain while his apartment was ransacked[7]; Thompson remained in the midst of the plundering (Tr. 15-16, 69). Moreover, when the prizes have been gathered, the robbers announce to complainant that they are going to take Thompson with them,

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[5] Significantly, there was one occasion shortly before Christmas that Thompson brought appellant Watts to Ledbetter's apartment with him (Tr. 12-14).

[6] Thompson usually visited around 6:00 p.m., about a half hour after Ledbetter came in from work (Tr. 13), and would leave after about a half hour or an hour (Tr. 14).

[7] Thompson's own testimony, though it need not be relied on to show the sufficiency of this evidence, indicates he was not bound (Tr. 204).

lest, we fear, his unaccountable disappearance might possibly be misinterpreted (Tr. 17, 19).

These developments would alone be sufficient for jury consideration as to Thompson's criminal involvement, but there are some most telling implications in his subsequent conduct during the police investigation. While being considered as one of the victims of the holdup, Thompson's attempt to protect his comrades betrays him. After complainant had identified Watts' photograph, police officers showed the same group of photographs to Thompson and he deliberately excluded Watts and his brother, indicating he knew them and that they were not involved in the holdup (Tr. 115).[8]

Moreover, it is clear that Thompson's simple story about the events after he was "taken" from complainant's apartment could not withstand, with consistency on a crucial detail, two simple interviews. Thompson made it clear that he was himself a victim in the holdup—to the loss of his only forty cents—and had returned to the complainant's apartment by bus, paying his fare with 30 cents, but when confronted with an earlier version that his only forty cents had been taken from him, and that bus fare was thirty-two cents, he admitted that he made a "mistake" and that "the robber" gave him a bus token (Tr. 115, 116, 134-135).

We find nothing in this evidence that would have justified the trial judge in taking the case from the jury (Tr. 158-159, 161) or would have invalidated the verdicts had Thompson chosen not to present evidence.

Thompson however presented evidence and while he claimed noninvolvement in the robbery, much in his testimony could only serve to strengthen the Government's case. See *Thompson* v. *United States, supra.* Thompson stated he went to Ledbetter's place for a drink and contrary to Ledbetter's testimony he indicated that Ledbetter gave him one[9] (Tr. 201, 214). That was not the only respect in which

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[8] Thompson was later to testify himself that he did not adequately observe three other men involved in the holdup (Tr. 229-230).

[9] Thompson said he indicated to Ledbetter that he had only $2.40; two dollars of this was to pay for the liquor he was to receive then and fifty cents (?) was to go toward an "old bill" (Tr. 201). Yet, unexplainably the holdup men took forty cents from him, as he later testified (Tr. 205, 216).

his testimony differed from Ledbetter's. Among other things, he testified that complainant responded to the knock upon the door, and that he lay on the floor face down (Tr. 202, 203, 204, 215).

More significantly however, he testified that the very robbers who abducted him and were debating whether to drown him, *i.e.*, "to throw . . . [him] in the river" (Tr. 205), ultimately–indeed charitably–decided to merely shove him out of their car, and to give him a bus token for his apparent journey a few blocks back to the robbery scene (Tr. 206, 221, 224). There can be little wonder that an intelligent jury chose to reject Thompson's desperate concoction.

The evidence would hardly restrain the trial judge at either appropriate juncture from submitting the case to the jury for it to perform its traditional function. The verdict having been returned, it can be sustained on the substantial evidence, viewed as it must be, most favorably to the Government. *Glasser* v. *United States, supra.*

II. There was no abuse of discretion in denying appellant Thompson's motion to sever.

(Tr. 7-9)

Appellant Thompson claims that the trial court's refusal to grant him a severance upon his motion at the beginning of trial (Tr. 7-9) permitted him to be tried, and allegedly prejudiced, by the joint trial with co-defendant Watts, against whom he contends the evidence was "far more damaging." *See McHale* v. *United States*, 130 U.S. App. D.C. 163, 164, 398 F.2d 757, 758, *cert. denied*, 393 U.S. 985 (1968). (Thompson's br., pp. 21-24). We cannot agree.

Generally, defendants charged with jointly committing a criminal offense are to be jointly tried. *E.g., United States* v. *Gambrill & Hunter*, ___ *U.S. App. D.C.* ___, ___, ___ F.2d ___, ___ (D.C. Cir. Nos. 23,512 & 23,806, July 29, 1971, slip. op. at 22); *Brown* v. *United States*, 126 U.S. App. D.C. 134, 375 F.2d 310, *cert. denied*, 388 U.S. 915 (1967); Rule 8(b) F.R.Cr.P.

The matter of severance of defendants who have been properly joined for trial is one over which the trial court

possesses great discretion and exercise of that discretion can be reversed on appeal only when it is shown to have been clearly abused. *Opper* v. *United States,* 348 U.S. 84 (1954); *United States* v. *Gambrill & Hunter, supra; Matthews* v. *United States,* 115 U.S. App. D.C. 339, 319 F.2d 740 (1963), *cert. denied,* 388 U.S. 943 (1964); *Robinson* v. *United States,* 93 U.S. App. D.C. 347, 210 F.2d 29 (1954); see Rule 14, F.R.Cr.P.

A considerably disparate amount of evidence against a co-defendant may conceivably require severance under some circumstances, but the evidence against Watts was not so "far more damaging," if more damaging at all, than that against Thompson as to warrant that relief here. While complainant Ledbetter's unequivocal identification of co-defendant Watts, known to complainant, was strong, so was the evidence, albeit circumstantial, against Thompson who police investigation revealed was the "set-up" and "inside man", exploiting and betraying the considerateness of an unsuspecting friend. The evidence was not so different in quantum as it was in nature, considering the role that each conspirator was to play. Thus, Thompson was strongly implicated by:

(1) his persistence in seeing complainant on this particular occasion at a time which was late and unusual in view of Thompson's apparent habit of visiting the complainant much earlier;

(2) his pretext for wanting to enter (to obtain a drink when he had his own);

(3) his apparent eagerness to answer a knock upon his host's door which only he heard;

(4) his comparatively considerate treatment by the robbers;

(5) his inability to be consistent on a seemingly unimportant, but not likely to be "mistaken", detail (manner of returning to complainant's home) after his "abduction"; and

(6) his affirmative exclusion of Watts as a suspect by declaring, even though admittedly without having observed all the robbers sufficiently, that Watts was not involved in the robbery.

Thompson clearly fails to make an adequate showing under *McHale*.

Even assuming that the requisite showing had been made the trial court did not abuse its discretion in disallowing severance because the simple evidence was such that the jury could weigh for itself the import it had against each defendant, be it Watts' positive identification or Thompson's guileful conduct. Particularly since the nature of the evidence against each was quite different, there was little likelihood of any "rub-off" effect. The jury could easily compartmentalize the evidence. Moreover the jury had the benefit of very precise and full instructions from the trial judge to consider the evidence against each appellant separately, and that a determination as to one defendant "should not control or influence your verdict respecting the other defendant" (Tr. 267).[10]

Thus, in addition to failing to show any greatly preponderate evidence as to his co-defendant, Thompson has failed to show the likelihood of any prejudice by the joint trial, unless of course it is

> [t]he mere fact that . . . [he] might have had a better chance of acquittal if tried separately . . . [which] does not establish his right to severance. Citation omitted. *Robinson* v. *United States, supra* at 349, 210 F.2d at 31.

III. The trial court adequately instructed the jury to consider the evidence separately as to each defendant.

(Tr. 236, 248, 265-269)

Although appellant Thompson did not submit proposed instructions to the trial judge (Tr. 236) and had no occasion to object to the concise, clear, and proper instructions which she gave regarding jury consideration of the evidence as it applied to each defendant (Tr. 265-269), he is obliged now to argue that it was plain error under Rule 52(b), F.R.Cr.P., for the trial judge in failing "to explain the differing roles

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[10] See Argument III, *infra*.

of Thompson and Watts, to identify which evidence related to which defendant, and adequately to explain that the guilt of each had to be separately considered." (Thompson's br., pp. 24-31). We submit that there was no error at all in the instructions in this respect, hardly plain error.

Initially, the trial judge instructed the jury that the Government was obligated to prove beyond a reasonable doubt that the defendants committed the crimes charged in the indictment (Tr. 248). As we have indicated the evidence was quite simple. As to appellant Watts, it consisted of his identification by complainant Ledbetter who remembered him; as to appellant Thompson it was his questionable conduct as a "victim" of the robbery. Watts claimed an alibi, suggesting Ledbetter had made a mistaken identification; Thompson simply denied participation in the robbery and maintained he was truly a victim. The circumstances of the holdup and the nature of the roles each defendant played clearly served to show which evidence would properly bear against him.[11] Indeed, no evident act directly connected Thompson with the crimes during their commission, as did the acts of Watts. For the most part it was Thompson's acts before and after the actual perpetration of the holdup that implicated him. It is to state the obvious, to say that this was apparent to any attentive and intelligent juror—without any instructions. As to respective acts, we therefore suggest that it would be difficult to imagine a more appropriate case where one could more naturally "compartmentalize" the evidence as to each defendant, as Thompson would have it (Br., p. 29). If the trial judge had ventured to be more personal in giving instructions with the comments on the evidence which Thompson urges—a course

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[11] This is obviously not the more difficult case where the defendants are seen together during or after the commission of some offense, for example a street robbery, where any apparent planning to commit the crime must have taken place only when the opportunity arose. *See, e.g. United States* v. *Thompson, supra* (after approaching the victim, defendant merely stood nearby while the principal robbed the woman complainant and both thereafter fled together); *Hunt* v. *United States*, 115 U.S. App. D.C. 1, 4, 316 F.2d 652, 655 (1963) (appellant and a companion were seen shaking hands after the victim discovered her wallet missing and both ran when the victim and police approached).

which neither defense counsel suggested and the trial judge wisely avoided—the liability for error would have been immense, not to mention the susceptibility to successful appellate attacks. A joint trial is perhaps complicated enough without the trial judge needlessly embarking upon some delineation of specific acts which are thought ascribable to each defendant. Stressing to the jury, as here, to consider the evidence separately against each defendant was sufficient (Tr. 267).

Moreover, the trial judge gave an instruction on aiding and abetting which was proper and in accord with the model instruction appearing as Instruction No. 47, Junior Bar Section of D.C. Bar Ass'n, Criminal Jury Instructions (1966) and Thompson's role under the Government's theory could be properly assessed.

Astute defense counsel apparently found these instructions to be fair and adequate. So do we. There could hardly be plain error here, for there is no error at all.

IV. The trial court did not err in allowing police testimony regarding appellant Thompson's statements given during routine questioning without *Miranda* warnings when he was considered a victim of the robbery.

(Tr. 6-8, 112, 114-117, 128, 134-135, 238)

Thompson claims that the testimony of the police officers as to his statements during two interviews following the robbery should have been suppressed by the trial judge pursuant to his motion since he was not given timely warnings under *Miranda* v. *Arizona,* 384 U.S. 436 (1966). (Thompson's br., pp. 31-44). We do not agree.

His motion came after the close of all the evidence (Tr. 238), even though the prosecutor had made a special effort to alert counsel before voir dire that some of the Government's evidence against Thompson would consist of his conflicting statements to the police when he was considered a victim of the holdup. No objection whatever was made then (Tr. 6-8). We think the motion came too late, and being untimely, should not now be considered on appeal. See

Segurola v. *United States,* 275 U.S. 106, 112 (1927); *Bailey* v. *United States,* 131 U.S. App. D.C. 314, 404 F.2d 1291 (1968).

In any event, this belated claim was wholly without merit. Officer Morrison, who investigated the robbery with other officers, testified that on December 28, five days after the holdup he interviewed complainant, as he was to numerous times, and showed him photographs from which he identified Watts. (Tr. 112, 114). Immediately thereafter, the officer interviewed the other purported victim, appellant Thompson, at his home and followed the same photographic procedure. In the interview at that time Thompson indicated that forty cents had been taken from him and that after being shoved out of the moving car by the robbers, he walked back to Ledbetter's apartment (Tr. 115-117). Later, on January 4, 1970, Officer Porter, also investigating the case with Officer Morrison, again interviewed Thompson who related that after being shoved out of the car he returned to Ledbetter's apartment by bus, paying his fare with thirty cents. When asked about his previous statement that his only forty cents had been taken from him and about his apparent ability to take a bus when the fare was thirty-two cents rather than thirty cents, appellant admitted he had made a mistake and that one of the robbers gave him a bus token. Officer Porter testified that these statements made him suspicious of appellant Thompson (Tr. 134-135). These were the specific statements to which the motion was addressed.

Thompson's statements were not given under circumstances even remotely akin to the custodial interrogation upon which *Miranda* is expressly premised.

Thompson attempted to cast himself in the role of a victim, in contrast to the situation in the cases relied on by him. Having done so, he was beyond the protections of *Miranda,* as this Court very recently held in *United States* v. *Cobb* (*Stanley*), D.C. Cir. No. 24,253, September 24, 1971. There appellant had called the police to report that he had been injured by four intruders in the restaurant where he worked. When police arrived, two of appellant's fellow

employees were found stabbed to death and he himself showed apparent knife wounds. Unable to find any indication that anyone other than the three employees had been in the building, the police eventually decided to arrest appellant. In affirming the conviction, the court observed there:

> The line between custodial arrest, on the one hand, and unfocused investigation, on the other, is not, as this court has recognized, always easily drawn. *Allen* v. *United States,* 129 U.S. App. D.C. 61, 63-4, 390 F.2d 476, 478-9 (1968). But the appellant's apparent effort in this case to cast himself in the role of a victim makes this case not only unique but readily assimilable to the non-*Miranda* pattern. Slip op. at 3.

Thompson's real plaint is that as a purported victim, he was apparently interviewed too much.[12] His statements however were given in the very early stage of police investigation, and the police had no reason to regard Thompson in any role but as a victim, though by the second interview, his story had begun to reveal its ameboid qualities. This was not sufficient to convert it into custodial interrogation necessitating *Miranda* warnings. As this Court noted in *Cobb:*

> There are, as is usually the case, facts which, in isolation, look in different directions. But the picture that emerges from the whole is that of a police response to a bizarre situation, which response was not patently illegitimate in its assumption that appellant was himself the object of a crime and not its perpetrator. *As the investigation proceeded, that assumption became increasingly dubious, but this does not convert the earlier efforts to obtain information into a relationship which required warnings before those efforts could properly be made.* Slip op. at 3. (Emphasis added).

The belated motion to suppress Thompson's statements was thus properly denied.

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[12] Complainant Ledbetter was interviewed numerous times (Tr. 128).

V. The single statement of the prosecutor in rebuttal argument regarding two witnesses appellant Watts did not call does not constitute prejudicial or reversible error.

(Tr. 80-83, 89-90, 243-244; S.Tr. 11, 26, 43-44).

Out of the presence of the jury it had been indicated that appellant Watts might call two witnesses, Bonzella Waters and Jerry Williams, in his defense.[13] Neither witness, however, though apparently introduced during the voir dire examination,[14] was actually called in Watts' defense. Williams was referred to several times in the closing argument of Watts' counsel (S. Tr.[15] 26). Appellant Watts claims that the following brief rebuttal remark of the prosecutor which merely referred to these witnesses, and which prompted his objection (Tr. 243-244), was prejudicial (Watts' br., pp. 6-13):

> Examine this alibi of Mr. Watts. His wife comes in—and who else would come in? His wife comes in. They mentioned in the opening statement of defense counsel for Watts that they were going to bring in a couple of other people: Jerry Williams and somebody named Bonzella Waters. But his wife comes in and she testified about what went on that night of the 23rd. (S. Tr. 43-44).

These witnesses were not mentioned in the opening statement for appellant Watts, as he points out, and the prosecutor was undoubtedly mistaken in this reference (S. Tr. 11). But this single, isolated, and clearly inadvertent reference to these witnesses was buried deep in the total remarks of the prosecutor (as well as other counsel) which are

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[13] Miss Waters would presumably have testified that complainant told her that he (Ledbetter) did not know the identity of the robbers and that he had not identified anyone, but complainant testified himself that he had not told her anything (Tr. 89-90); Williams would have presumably testified that on the night of the robbery he told complainant Ledbetter appellant's full name but complainant had indicated as much (Tr. 82-83).

[14] This examination was not transcribed. The assumption is based on the representation of Watts' appellate counsel (Br. 7), also trial counsel.

[15] Supplementary transcript containing opening and closing arguments, November 16 and 17, 1970.

otherwise unassailed. We think such reference hardly had any impact whatever on the jury.

For one thing, the reference is innocuous, not expressing a complete thought. While it appears in the context of examining Watts' alibi defense,[16] it begins and ends with reference to Mrs. Watts who was his alibi witness. The inadvertence of the remark and the incompleteness of the thought is underscored by the fact, which appellant Watts recognizes (Br., p. 8), that the prosecutor did not proceed to argue that the failure to call such witnesses might warrant the inference that their actual testimony might have been adverse to appellant Watts.

The prejudicial effect of any such remarks of the prosecutor in this solitary and isolated instance must be assessed against the strength of the Government's evidence against Watts,[17] which we feel cannot be more appropriately characterized than as strong, if not overwhelming, even though based solely on the identification of Watts by Ledbetter. While complainant Ledbetter had some apparent difficulty with Watts' name which he ascertained from Jerry Williams, there was little difficulty in remembering who he was and where he had been seen.

Moreover, it could not have been improper for the trial judge to deny appellant's request for an instruction to the jury to disregard the remarks (Tr. 244). As we have indicated, the remark was singular and isolated. Watts himself concedes the reference was mild and isolated (Br. 10), and since we feel it was surely innocuous enough, any particular focus on the reference in an instruction supposedly intended to be curative would have more likely served to enlarge the reference, if it had been remembered, and to generate speculation, if it had not. We therefore suggest that the trial judge was correct in not giving Watts' requested instruction to the jury. If failing to do so was error, again there was no prejudice.

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[16] With the mentioning of the witnesses in cross-examination of complainant (Tr. 80-83, 89), the attentive jury could readily appreciate that they were not *alibi* witnesses.

[17] *See, e.g., Corley* v. *United States*, 124 U.S. App. D.C. 351, 352, 365 F.2d 884, 885 (1966); *Jones* v. *United States*, 119 U.S. App. D.C. 213, 214, 338 F.2d 553, 554, n.3 (1964).

VI. The evidence was sufficient on the identification of appellant Watts to withstand his motion for judgment of acquittal.

(Tr. 269)

Complainant Ledbetter unequivocably identified Watts as the robber with the shotgun in his apartment. Ledbetter had seen Watts for years in the neighborhood, had seen him visiting a fellow tenant across the hall, and though he did not know appellant's name, he obtained his full name from the fellow tenant on the same night of the robbery. See Counterstatement.

Despite any seeming or actual inconsistency in the testimony of an "elderly, inarticulate, and extremely difficult to understand" robbery victim or his "wholly illogical" conduct following a terrifying experience, appellant Watts delineates such matters intended to undermine the reliability of his identification only to conclude, as he must, "that much of . . . [his] argument is more properly to be addressed to a jury and that the jury found against him in the instant case." (Watts' br., pp. 15, 16, 17). We are compelled to agree and find nothing here under traditional principles [18] that should have deterred the trial judge, as a matter of law, from submitting the case to the jury, or for that matter, should now incline this Court to disturb the jury's swift verdicts (Tr. 269).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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[18] *E.g., Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947).

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit
FILED NOV 16 1971
Nathan J. Paulson
CLERK

No. 71-1169

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM THOMPSON,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

ERRATA TO APPELLANT THOMPSON'S REPLY BRIEF

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UNITED STATES COURT OF APPEALS
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No. 71-1169

UNITED STATES OF AMERICA,

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ON APPEAL FROM THE UNITED STATES DISTRICT
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ERRATA TO
APPELLANT THOMPSON'S REPLY BRIEF

William Thompson, appellant in the above-captioned case, though his undersigned attorney, appointed by this court, hereby files an errata to his Reply Brief, filed November 8, 1971.

The Reply Brief contains the following errors:

Page 2 (Footnote 1): "(Govt. Br. 8)" should read "(Govt. Br. 9)"

Page 13 (line 13): "(436 U.S. at 471)" should read "(384 U.S. 436 at 477)"

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Errata to Appellant Thompson's Reply Brief was personally served upon Julius Johnson, Assistant United States Attorney, at the United States Court House, Washington, D. C., this 9th day of November, 1971.

Selma M. Levine

Selma M. Levine

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 5 1972

Nathan J. Paulson
CLERK

UNITED STATES COURT OF APPEALS
IN THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1169

UNITED STATES OF AMERICA, Appellee,

v.

WILLIAM THOMPSON, Appellant

Appeal from the United States District Court
for the District of Columbia

PETITION FOR REHEARING
AND
SUGGESTION FOR REHEARING IN BANC

Pursuant to Rule 40, F.R.App. P., appellant moves the panel to grant rehearing and to reverse the judgment of conviction it affirmed on May 10, 1972, because its decision is in direct conflict with Miranda v. Arizona, 384 U.S. 436 (1966) and previous decisions of other panels in this court relating to "custodial interrogation." If the evidence on this issue is deemed insufficient, the case should be remanded to the court below for a Miranda hearing.

Alternatively, appellant suggests, pursuant to Rule 35, F.R. App. P., that this case he reheard in banc because the panel's decision seriously undermines the principles enunciated in Miranda v. Arizona, supra, raising a constitutional question

of exceptional importance.

I.

Miranda v. Arizona, 384 U.S. 436 (1966) and the cases which have applied it in this Court, notably Allen v. United States, 129 U.S. App. D.C. 61, 390 F.2d 476, clarified, 131 U.S. App. D.C. 385, 404 F.2d 1335 (1968); United States v. Robinson, ___ U.S. App. D.C. ___, 439 F.2d 553 (1970); and United States v. Cobb, ___ U.S. App. D.C. ___, 449 F.2d 1145 (1971), require Miranda warnings to precede police questioning of a subject when he is in "custodial interrogation." The cases rely on a test of whether the police investigation has "focused" on the subject to determine the point at which the police interrogation has become "custodial." 1/

1/ In Miranda, the Supreme Court explained "custodial interrogation" to be "what we meant in Escobedo when we spoke of an investigation which had focused on an accused." 384 U.S. at 444, and fn. 4 (emphasis supplied).

In the first Allen opinion, 129 U.S. App. D.C. 61, 390 F.2d 476, this court sanctioned a police interrogation absent Miranda warnings because the police were "reacting to a street scene and trying to run down the facts" and were not "staging an interrogation that had focused on a subject." 390 F.2d at 479, (emphasis supplied). After remand, when the case again came before the same panel, the new record showed that the police had in fact focused their investigation on the defendant at the time of this interrogation. Under these circumstances, this court held the interrogation to be in "clear violation" of Miranda. 404 F.2d at 1336.

In Robinson, 439 F.2d 553 (1971), where the police questioned a hospital inmate as to his whereabouts during a murder on the hospital grounds, this court held that "the interrogation had sufficiently focused on the appellant [defendant] to cause the absence of the Miranda warning to bear upon any confession which followed." 439 F.2d at 559 (emphasis supplied).

In United States v. Cobb, ___ U.S. App. D.C. ____, 449 F.2d 1145 (1971), this court decided that Miranda warnings need not precede police on-the-scene questioning that was part of an "unfocused investigation." The court further observed that Miranda did not apply because the police "inquiries were investigative, as distinct from being designed to elicit admissions of guilt from a known suspect." 449 F.2d at 1147.

We seek this rehearing because the panel either disregarded, misapprehended, or failed properly to apply the "focus" test to the record here. Without detailing the underlying facts, it decided the police failure to give Miranda warnings before interrogating appellant did not require suppression of the police testimony relating to statements elicited from him during those interrogations. The panel recognized, however, that appellant "started out claiming himself to be a victim and wound up later to be a suspect ..." (Slip Op. 3). And the concurring opinion of Judge Fahy acknowledged that (1) appellant was "under suspicion" of the crime by the police at some point when he was interrogated, and (2) that the interrogations occurred during the "following-up" of police suspicions (Slip Op. 4).

Despite recognition that appellant was a suspect before damaging statements were elicited by the police, the court nevertheless concluded that "the statements objected to were not made at a point in the investigation which brought Thompson within the protection of Miranda" and were not made in "custodial interrogation." (Slip Op. 2).

Since the panel did not discuss the facts which led to the conclusion, it does not clearly appear why the panel thought that the focus of the investigation was not on appellant during the third and fourth police visits to his room when

damaging statements were elicited from him. By its heavy reliance on United States v. Cobb, 449 F.2d 1145 (1971), which affirmed denial of Miranda warnings only for "on the scene questioning," and reference to the police need to make "some inquiry," the panel apparently mistakenly assumed that the critical interrogations of appellant were at an early, initial stage.

This assumption is completely without foundation. For the record is clear that the police investigation had focused on appellant by the third and fourth visits, if not before.

The burglary occurred on December 23, 1969, at the home of an acquaintance of appellant. Appellant was first questioned at the scene of the crime on the night it occurred. Although appellant claimed to be merely a witness and victim of the crime on this occasion, the investigating police officer concluded soon after the interview that appellant was criminally involved in the burglary (Tr. 100).

On three separate subsequent occasions, December 26, 1969, December 28, 1969, and January 4, 1970, the police continued to interrogate appellant about the crime when he was alone in his boarding house room. Although the December 26 questioning principally concerned other suspects in the case (Police Report of February, 1970, p. 2), the interrogation of December 28 began to focus on appellant's conduct during and immediately after the

crime. 2/ Appellant told police that the burglars had forced him to leave the scene of the crime with them in their get-away car, that he had later been pushed out of the car, and that he had then walked back to the scene of the crime (Tr. 114-115).

On January 4, 1970, one week after the December 28th interrogation, the police returned to appellant's home to question him a fourth time. The purpose of this interrogation, according to the police, was to "confront" appellant with the "discrepancy" in his previous statements (Tr. 134). Again, focusing upon his conduct immediately after the robbery, the police claimed the elicited a different story from appellant than the one received in previous statements and pressed him to explain the inconsistencies in his account (Tr. 134-135).

It seems impossible not to conclude on this record, particularly in view of the court's recognition that appellant became a "suspect" during the police investigation, that at least by the third and fourth questionings, appellant was the "focus" of the investigation.

At trial the police testified about appellant's statements of December 28 and January 4, and described their efforts to get appellant to clarify his story during the latter interrogation (Tr. 114-115, 134-135). The Government placed

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2/ The police testified that, at this stage of the investigation, the victim of the crime had already identified appellant's co-defendant as the perpetrator of the crime and the police "felt that we had the individual involved." (Tr. 117-118). Thus, there was no reason to question appellant on December 28 and January 4 unless the focus of the investigation had shifted to appellant.

heavy reliance upon this police testimony, both at trial and on appeal (Supp. Tr. 8, 19; Appellee's Brief 18-19). It did not challenge appellant's showing that admission of this testimony was harmful to him because it inevitably played a role in his conviction.

II.

The panel's conclusion that appellant was not in "custodial interrogation" at the time of the third and fourth interrogations resulted not only from a misreading of the record but also from a misconception of the "focus" test and the Allen, Robinson and Cobb cases which applied it in this Court. The panel's decision conflicts with these precedents and seriously weakens the constitutional protections accorded by Miranda.

1. The panel's disregard of the "focus" test appears to have stemmed in part from the fact that Thompson, like the defendant in United States v. Cobb, ___ U.S. App. D.C. ____, 449 F.2d 1145 (1971) claimed to be a victim at the outset. But there is nothing in Cobb which remotely suggests that such a victim can never become the focus of an investigation. Quite the contrary.

In Cobb, moreover, the only interrogation which was sanctioned was an initial "on the scene" inquiry, minutes after the crime occurred. This Court held that such "on the scene" questioning was an "unfocused investigation" and hence not

protected by Miranda. 3/ The directed nature of the December 28 and January 4 police interrogations in appellant's room, many days after the crime, stands in stark contrast. They did not occur either at the scene or in the initial stages of police fact-finding.

Indeed, in Cobb, this Court took pains to point out that as "the investigation proceeded, [the] assumption . . . that [appellant] was himself the object of a crime and not the perpetrator . . . became increasingly dubious" (449 F.2d at 1147), and indicated that where, as here, there was interrogation beyond an "on the scene" investigation, warnings would have been required.

Surely the fact that one initially denies involvement or claims to be a victim, or a witness, or a person with "close knowledge" of the crime (Slip Op. 3), does not deprive him of Miranda protection if the police at some point begin to regard him as a serious suspect. In Robinson, the defendant's denial of involvement and claim he was far away from the scene of the crime when it occurred was not considered to abrogate or even "weaken" Miranda rights. (Slip Op. 2).

2. The panel appears to have adopted a rule that a suspect who first says he did not participate in an offense is not in "custodial interrogation" for purposes of Miranda

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3/ Cobb is entirely consistent with Allen, Robinson and indeed with Miranda itself which exempted "general on-the-scene questioning" from the warnings requirement fashioned in that case. 384 U.S. at 477.

warnings at least until the moment police have sufficient cause to arrest and charge him. 4/

Such a rule cannot be reconciled with the "focus" test, and it is inconsistent with the Robinson holding that Miranda warnings are applicable to an interrogation even though, according to police, the defendant was "not in custody" at the time and the police "had no intention of arresting" the defendant when they interrogated him. 439 F.2d 556. By refusing to apply the "focus" standard until there has been probable cause for arrest, the panel would deprive suspects of the protection of Miranda at the "critical" stage of a police interrogation when incriminating statements are most likely to be elicited. Cf. Escobedo v. Illinois, 378 U.S. 478, 487 (1964).

Since police interrogation is probably not needed when a suspect admits his guilt, in most cases the Miranda issue will arise when the police are confronted with a suspect who, like appellant, denies involvement. Moreover, the police may seek to elicit incriminating statements from a suspect on whom they have focused before they conclude they have sufficient cause to arrest him; that conclusion may be based, as it was here, partly upon such statements.

4/ The opinion states that the police (1) "are to be commended for fully checking out all leads rather than arriving at a premature conclusion of guilt"; (2) "should not be blamed for leaving no stone unturned before they arrive at the very serious decision to charge a person with the commission of a serious felony"; and (3) "should not be placed in the position of practically being required to accuse every person they interview who has any close knowledge of a crime." (Slip Op. 3, emphasis supplied).

4. The question presented by this case is of significance not only in defining the constitutional rights of criminal suspects but also in guiding the police in their investigations. Since the "requisite degree of custodial interrogation necessary to trigger Miranda requirements continues to be a difficult question to resolve," Note, The United States Court of Appeals: 1970-71 Term, Criminal Law and Procedure, 60 Georgetown Law Journal 281, 329 (1971), appellant suggests that this case, which cannot be reconciled with other precedents in this Court, be reheard in banc so that a uniform standard may be fashioned in this critical area of law enforcement.

III.

The evidence in the record is, we believe, sufficient to establish that appellant was in "custodial interrogation" at the time of the third and fourth police questionings. But if the record should be deemed insufficient for this purpose, then the case should be remanded to the trial court for a hearing and decision on the Miranda question.

The trial judge did not, as the concurring opinion noted, permit inquiry into the custodial nature of the interrogation because she incorrectly held the statements to be exculpatory and thus not protected by Miranda. 5/ Thus, appellant has never been afforded

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5/ This holding was clearly incorrect as the per curiam opinion implicitly conceded and as the concurring opinion explicitly found (Slip Op. 4).

an opportunity to examine the police officers and other appropriate individuals whose testimony would be relevant to the issue whether appellant was "in custody" or a suspect on whom the investigation focused at the time of the interrogations.

A court "cannot accept such statements [elicited from the defendant by the police] in evidence until it is affirmatively satisfied that they were not preceded or accompanied by custodial interrogation." Allen v. United States, supra, 404 F.2d at 1337 (emphasis supplied). Since the trial judge never reached "custodial interrogation", she could not have been "affirmatively satisfied" on this issue.

CONCLUSION

For the foregoing reasons, the Court should grant rehearing, set aside its decision of May 10, 1972, and reverse the judgment and conviction because of the trial court's failure to suppress damaging statements elicited from appellant during custodial interrogation without the warnings required by Miranda v. Arizona.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certifiy that a copy of the foregoing Petition for Rehearing and Suggestion for Rehearing in banc was personally served on Julius Johnson, Esq., Assistant United States Attorney, United States Court House, Washington, D. C., this 5th day of June, 1972.

Selma M. Levine

Selma M. Levine

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1169

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM THOMPSON,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT THOMPSON

United States Court of Appeals
for the District of Columbia Circuit
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* Cases or authorities chiefly relied upon are marked by asterisk.

I.

The Insufficiency of the Evidence

(Tr. 13-14, 61, 62, 84, 94A, 107-108, 127, 131, 177, 202, 214, 215.)

Appellee's failure to deal in any way with the Bailey and Scott cases, chiefly relied on by Thompson (Main Br. 10-14, 18-20), let alone to refute our contention as to their controlling effect here, only underscores the inherent weakness of the case against Thompson.

Appellee's main contention is that Thompson "either participated in the selection of Ledbetter as the victim or knowingly facilitated the perpetration of the robbery upon him, or both . . ." (Govt. Br. 8). To implicate Thompson, appellee relies primarily on inferences drawn from ambiguous circumstances surrounding Thompson's presence at the scene and his post-robbery conduct, which taken as a whole are said to show that he "set up" the robbery (Govt. Br. 8). We have shown in detail that the circumstances to which appellee points, even if characterized as "suspicious" or questionable, are insufficient under Bailey and Scott to sustain an aiding and abetting conviction.

It is now charged that Thompson "participated" in the selection of Ledbetter as a robbery victim (Govt. Br. 8). But there is no foundation whatever in the record for this charge. The coincidence that Thompson knew both the victim and the robber is surely no proof of a scheme to rob Ledbetter. Ledbetter testified he never told Thompson of the significant amount of cash hidden in his apartment (Tr. 107-108), and thus it cannot be inferred from this record that Thompson was the source for the robbers' information.

Nor does the record show beyond doubt that Thompson's purpose in visiting Ledbetter was to "permit" the robbers to enter Ledbetter's apartment by unlocking and opening the front door when the robbers knocked (Govt. Br. 9). Thompson's visit to Ledbetter, his drinking companion, was little different from those on previous occasions. 1/

1/ Although Ledbetter testified Thompson had never previously visited him as late as 11 p.m., he conceded that such visit may have come after 9 p.m. and that he "was paying no close attention" to the time of Thompson's previous visits (Tr. 94A). The contention then that the 11 p.m. visit was "much later" than previous ones (Govt. Br. ~~8~~ 9) is unfounded.

While Ledbetter testified that Thompson had his own bottle, Thompson stated that, as on previous evenings, he bought the liquor from Ledbetter (Tr. 201-202).

It is not clear on this record who unlocked the first of the three locks on the door, leaving the door ajar with a chain on it. Even if Ledbetter's statement is credited that it was Thompson who first went to the door when there was a knock 2/, Thompson's response to the knock was consistent with that of a visiting friend. Moreover, what is clear is that the initial opening of the door did not permit the robbers to enter. According to the police, there was a chain lock on the door at the time the robbers knocked, and they had to break this lock and force open the door. 3/ At most, then,

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2/ Thompson testified that it was Ledbetter who "cracked open" the door (Tr. 202).

3/ One of the investigating police officers, stated that the chain lock "was pulled loose from the door" (Tr. 127) when the door"was opened with the latch still in place and then the door was forced open from that position." (Tr. 131). This occurred, the officer said, when Thompson opened the door "two or three inches" and it was "kicked in" immediately thereafter (Tr. 131).

Like much of Ledbetter's testimony, his statements as to which locks on the door were fastened when the robbers entered is confusing and contradictory. Ledbetter testified that the front door had three locks -- a dead lock, a spring lock, and a chain lock (Tr. 61, 62). He first testified that when Thompson was admitted he didn't bolt the lock "you unlock with a key", but that he had "used the other ones" (Tr. 61). He later testified that only the spring lock was locked, not the chain lock (Tr. 62).

Given the contradictory testimony of Ledbetter and the unequivocal testimony of the police officer that the robbers broke the chain lock when they entered, no reasonable juror could have concluded that the chain lock was unfastened when the robbers knocked on the door and forced their way into the apartment.

what Thompson did was to open the door only "two or three inches" while keeping the chain lock fastened (Tr. 131). Immediately thereafter the robbers "kicked in" the door, broke the chain, and burst into the room (Tr. 127, 131). Since chain locks are designed so that one may open a door slightly to identify those outside while maintaining security within, Thompson's conduct in utilizing the chain lock in the precise manner for which it was intended is evidence of nothing more than his role as a friend of Ledbetter, a spectator of the robbery, and a fellow victim.

As to Thompson's post-robbery conduct in aiding the robbery, appellee speculates that Thompson's failure to identify Watts as one of the robbers, constituted "attempted protection" of one of the robbery's perpetrators (Govt. Br. 8). There was nothing sinister in Thompson's inability to identify Watts. Like Ledbetter's failure to identify Watts until several days after the robbery, it is wholly consistent with his role as a victim of the robbery (Main Br. 17-19).

It is only by resorting to surmise that appellee can characterize Thompson as a knowing participant, for proof beyond a reasonable doubt that he was anything other than an innocent bystander or spectator is totally absent.

Under Bailey and Scott, the inferences on which appellee relies are too equivocal for conviction.

II.

Erroneous Failure to Sever and the Inadequacy of the Jury Instructions

(Tr. 267, Supp. Tr. 21)

The Motion to Sever. In dealing with our argument that the stronger case against Watts "rubbed off" on Thompson, appellee recognizes that the case against the two defendants were "quite different" (Govt. Br. 13). But, appellee says, the case against Watts, even if more damaging, was not "so 'far more damaging'" as to require severance (Govt. Br. 12).

What it takes for the Government to conclude that a "damaging" case against one defendant becomes "so 'far more damaging'" as to undermine the fairness of the trial of a co-defendant is not clear. But if ever that line can be crossed, it was crossed here. The case against Watts, unequivocally identified by an eye witness as the gun-carrier during the commission of the crime, was direct. It was characterized as "overwhelming" by the prosecutor (Supp. Tr. 21), and is now said to be "virtually unassailable"

(Govt. Br. 8). In contrast, as the government itself points out, "no evident act directly connected Thompson with the crimes during their commission, as did the acts of Watts," (Govt. Br. 14), and the implication of Thompson's guilt is derived from the most speculative inferences drawn from circumstantial evidence "before and after the actual perpetration of the hold-up." (Govt. Br. 14). The disparity in proof created for Thompson precisely the type of prejudicial rub-off which was said to warrant severance in United States v. Kelly, 349 F.2d 720, 759 (2d Cir. 1965), cert. denied, 384 U.S. 947 (1966); see also McHale v. United States, 130 U.S. App. D.C. 163, 164, 398 F.2d 757, 758, cert. denied, 393 U.S. 985 (1968).

Appellee's answer to our "rub off" argument is that the "nature of the evidence against each [defendant] was different," and severance was not needed because the jury "could easily compartmentalize the evidence" (Govt. Br. 13, emphasis supplied). Whether the government is referring to the quantum or quality of evidence, or the differing roles allegedly played by the co-defendants, there is nothing in Kelly or McHale which lends the slightest support to this novel principle. In Kelly, for example, it is plain that the nature of the evidence against the co-conspirators which had improperly rubbed off on Shuck was different not only in quantity but in

quality as well. It was direct, "testimonial and documentary", whereas that against Shuck was indirect, inferred, dependent mainly on the credibility of one witness, and "tenuous and insubstantial." 349 F.2d at 756, 758-59. Moreover, though it was clear that Shuck, like Thompson, was alleged to have played a much less active role than his co-defendants, nevertheless the court still concluded that severance was essential.

The Instructions. Appellee claims that, even if the evidence against Watts were far more damaging than that against Thompson, the court's generalized instructions were adequate to eradicate any prejudice arising from a joint trial. 4/ There was really no need, he says, for

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4/ That the court's recital may have been patterned after the three-paragraph, aiding and abetting instruction of the D.C. Bar Association Criminal Jury Instructions hardly proves its adequacy for this case. Providing a guide to the practitioner, the drafters emphasize that "no standardized set of instructions can cover every situation arising in the trial of a criminal case ..." Foreward, Criminal Jury Instructions for the District of Columbia, D. C. Bar Association (1966).

The American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury, points out that where pattern jury instructions are available, "counsel and the court should nonetheless remain responsible for ensuring that the jury is adequately instructed as dictated by the needs of the individual case, and to that end should modify and supplement the pattern instructions whenever necessary." Standard 4.6(a) and Commentary, p.111 (Tentative Draft, 1968).

Where, as here, there was a need to distinguish between the two defendants, an all purpose instruction obviously was not adequate.

"any" instructions -- let alone specific instructions -- on the differing roles of the two defendants, because those roles were "apparent to any attentive and intelligent juror . . ." (Govt. Br. 14).

Whatever the level of intelligence, the notion that the jury could have operated here "without any instructions", and certainly without particularized instructions, has no sanction in the criminal law. It improperly treats instructions as a meaningless ritual. It runs directly contrary to the teaching of Blumenthal v. United States, 332 U.S. 539, 559-560 (1947); Schaffer v. United States, 362 U.S. 511, 515 (1960); and United States v. Kelly, 349 F.2d 720 (2d Cir. 1965), cert. denied, 384 U.S. 947 (1966).

These cases require, as essential safeguards for a joint trial, precisely what was not done here -- a "meticulous" setting forth of the evidence against each defendant, and a cautionary instruction about the bearing of damaging evidence against particular individuals (See Main Br. 25-30).

To paraphrase Kelly, 349 F.2d at 757, the trial court should have made clear "in the instructions to the jury that the proofs against [Thompson] were different from the proofs against [Watts], pointing out what the difference

was . . .", and"making sure that [Thompson] was given separate and individual attention from [Watts]." Thus the "delineation of specific acts" for each defendant, far from leading to the error appellee suggests (Govt. Br. 15), is precisely what the law enjoins upon a court in a joint trial. 5/

The absence of particularized instructions was not the only defect. As we pointed out (Main Br. 27-29), the court may well have affirmatively confused the jury in assessing the respective roles of Thompson and Watts when it made several generalized references to "the defendant" at critical points. Appellee has offered no rebuttal whatever to our contention that these confusing instructions not only failed to dissipate the prejudice to Thompson resulting from a joint trial, but rather served to enhance it.

5/ Unlike United States v. Hines, No. 23,281 (D.C. Cir., decided November 1, 1971), where the jury "was carefully instructed to avoid inferring guilt by association due to the joinder" (p.32), the court's passing and late reference to separate consideration at Tr. 267, appellee's only citation, was inadequate (Main Br. 29).

III.

Erroneous Failure to Suppress Testimony given During Custodial Interrogation Without Miranda Warnings.

(Tr. 117-118,134, 239-241)

Timeliness. Appellee argues that Thompson's motion to suppress the testimony of two police officers, relating to statements Thompson made to them on December 28, 1969, and January 4, 1970, was untimely because made at the close of the case. Although the prosecutor objected to the motion as untimely (Tr. 240), the court below did not reject the motion for this reason and instead chose to rule on the merits (Tr. 241).

While motions to suppress under Rule 41(e), F.R.Crim. P., should ordinarily be presented prior to trial, the rule itself, promulgated after Segurola v. United States, 275 U.S. 106 (1927), confers authority on the trial court to hear the motion at trial. As the Supreme Court explained in Jones v. United States, 362 U.S. 257, 264 (1959) (Frankfurter, J.), the rule requiring pretrial suppression motions is "not a rigid one" and the trial court "in its discretion may entertain the motion at the trial . . ." "This qualification proves", said the Court, "that we are dealing with carrying out an important social policy and not a narrow, finicky procedural requirement." Ibid.

The trial judge here quite properly exercised her discretion to hear Thompson's suppression motion at the close of the evidence, and no basis for reversal has been shown. Bailey v. United States, 131 U.S.App. D.C. 314, 404 F.2d 1291, 1292 (1968), is no authority for the proposition that this court is now barred from dealing with the merits. There the trial court did not reach the merits, and this court merely upheld the trial court's exercise of discretion in refusing to entertain the allegedly untimely suppression motion.

The Merits of the Suppression Motion. Appellee now implicitly concedes that there is no exception in Miranda for exculpatory statements. 6/ The December 28 and January 4 quesionings did not constitute "custodial interrogation", appellee here contends, because they occurred "in the early stages of police

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6/ At trial the Government argued that Miranda warnings were not required at the time of the December 28th and January 4th questionings because the statements elicited from Thompson were only exculpatory and because Thompson was not a suspect at the time of the questioning (Tr. 240). The trial court, relying on the Government's argument that Miranda did not extend to exculpatory statements, denied Thompson's motion (Tr. 239, 241).

investigation" when "the police had no reason to regard Thompson in any role but as a victim . . ." (Govt. Br. 17).

This contention flies in the face of the record. First, the December 28th and January 4th questionings did not occur at an "early stage" of the investigation. They were the third and fourth (and last) in a series of police-Thompson interviews that began on December 23, 1969, when the police already had expressed their suspicion of Thompson (See Main Br. 36-40). These confrontations occurred not at the scene of the crime, but in Thompson's boarding-house room 5 and 12 days after the robbery, and focused on Thompson's conduct during and after the robbery (Main Br. 40, 41). Moreover, since at that stage the investigating officer "felt that we had the individual involved [in the robbery]" (Tr. 117-118) and since Ledbetter had already identified Watts from the mugshots that the police showed him, there would have been no reason to confront Thompson again unless he were also under suspicion. And he certainly was subjected to custodial interrogation on January 4, if not before. One of the police officers who interrogated Thompson at that time testified that the purpose of the interview was to "confront" Thompson with the "discrepancy" in his statements to the police officer (Tr. 134).

The focused nature of the December 28 and January 4 police interrogation in Thompson's room, many days after the crime, stands in contrast to the facts in United States v. Cobb (Stanley), D.C. Cir. No. 24,253 (September 24, 1971) where the questioned statements were given to police by an apparent victim during an on-the-scene inquiry, minutes after the crime occurred. This court held in Cobb that such on-the-scene questioning was an "unfocused investigation" and hence not protected by Miranda. This holding is, of course, entirely consistent with the Miranda opinion itself which excepted "general on-the-scene questioning" from the warnings requirement fashioned in that case (384 U.S. 436 at 477) ~~(436 U.S. at 471)~~. Since the police interviews in question here did not occur either at the scene or in the initial stages of police fact-finding (Main Br. 34-42), neither the Miranda exception nor Cobb decision is applicable.

Appellee has not challenged our showing that admission of the police testimony relating to the December 28 and January 4 interviews was harmful to Thompson because it inevitably played a role in his conviction (Main Br. 42-44). Thus if, as we contend, there was error in admitting this testimony, the error was clearly not harmless.

Conclusion

We have shown here and in our main brief that the conviction of Thompson should be reversed with directions to enter a judgment of acquittal for insufficiency of the evidence. If the court should decide that the procedural errors, either singly or in their cumulative impact, deprived Thompson of a fair trial, then the case should be remanded for a new trial.

Respectfully submitted,

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